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No. 87-764-CSY
Status: GRANTED

Title: Florida, Petitioner
v.
Michael A. Riley

Docketed:
November 9, 1987

Court: Supreme Court of Florida

Counsel for petitioner: Thomson,Parker D.

Counsel for respondent: Salton,Marc H.

Entry	Date	Note	Proceedings and Orders
1	Nov 9 1987	G	Petition for writ of certiorari filed.
3	Dec 3 1987		Order extending time to file response to petition until January 15, 1988.
4	Jan 15 1988		Brief of respondent Michael Riley in opposition filed.
5	Jan 20 1988		DISTRIBUTED. February 19, 1988
6	Feb 22 1988		Petition GRANTED.
			**
8	Mar 23 1988		Order extending time to file brief of petitioner on the merits until April 30, 1988.
9	Apr 27 1988		Brief amicus curiae of Airborne Law Enforcement Assn., Inc. filed.
10	Apr 28 1988		Joint appendix filed.
12	Apr 29 1988		Brief amici curiae of Indiana, et al. filed.
11	Apr 30 1988		Brief of petitioner Florida filed.
14	May 12 1988		Order extending time to file brief of respondent on the merits until July 1, 1988.
15	May 18 1988		Record filed.
		*	Certified copy of original record received.
16	Jun 22 1988		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
17	Jun 30 1988		Brief amicus curiae of California Attorneys for Criminal Justice, et al. filed.
18	Jul 1 1988		Brief of respondent filed.
19	Jul 1 1988		Brief amici curiae of ACLU, et al. filed.
20	Jul 1 1988		Brief amicus curiae of Community Outreach to Vietnam Era Returnees, Inc. filed.
21	Jul 6 1988		CIRCULATED.
22	Jul 15 1988		Set for argument. Monday, October 3, 1988. (2nd case) (1 hr.)
23	Aug 1 1988	X	Reply brief of petitioner filed.
24	Oct 3 1988		ARGUED.

87-764

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

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99 pp

QUESTION PRESENTED

1. WHETHER THE FLORIDA SUPREME COURT'S HOLDING THAT GROUND OBSERVATIONS FROM A HELICOPTER AT A LAWFUL ALTITUDE OF 400 FEET OVER RESIDENTIAL BACKYARDS VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT CONFLICTS WITH CALIFORNIA V. CIRAOLO, 476 U.S. ____, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986)?

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OPINIONS BELOW

The decision in the court below is reported as Riley v. State, 511 So.2d 272 (Fla. 1987). (A-2-30).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the Florida Supreme Court on Petition for Certiorari under 28 U.S.C. §1257(3). The Florida Supreme Court decided this case on July 9, 1987 (A-2). Petitioner filed a motion for rehearing on July 23, 1987 (A-53-66). The court below denied that petition on September 11, 1987 (A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is applicable to the states through the offices of the Fourteenth Amendment. It provides:

> Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. **Searches and seizures.** - The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places or be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

In August, of 1984, Deputies Gell and Longworth of the Pasco County Sheriff's Office investigated an anonymous tip that Michael Riley was growing marijuana on a parcel of property he rented and occupied in Pasco County, Florida. After making a ground observation of tall plants growing in a greenhouse behind Riley's trailer, the officers obtained a helicopter and flew over the area. Flying at an altitude of approximately 400 feet, the officers observed through the two open sides and through missing panels in the roof of the greenhouse numerous marijuana plants growing. Based on this information the officers obtained a search warrant and seized 44 marijuana plants from the greenhouse.

Michael Riley was charged by information on August 16, 1984 with two counts of violating §893.13, Florida Statutes

(1983) (the unlawful manufacture and possession of marijuana). The defendant filed a motion to suppress evidence (A-42-45). After a hearing on the motion, the trial court issued its order suppressing the evidence on December 19, 1984. The facts of this case are set forth in detail in the trial court's order granting the Motion to Suppress. (A-46-52)

The state took an appeal to the Second District Court of Appeals for Florida. Florida's Second District reversed the trial court's order in its opinion issued on October 16, 1985. The opinion also certified a question to the Florida Supreme Court as one of great public importance (A-31-41).

The Florida Supreme Court reviewed the decision and reversed the district court's opinion on July 9, 1987 (A-2).

The state filed a motion for rehearing on July 11, 1987 (A-53). This motion

was denied on September 11, 1987 (A-1).

In the opinion below, the Florida Supreme Court held that the surveillance of the interior of a partially covered greenhouse in a residential backyard from a vantage point of a helicopter located 400 feet above the greenhouse constituted a "search" for which a warrant is required under the Fourth Amendment and Article I, §12 of the Florida Constitution. The decision found this to be true even though the court recognized that the helicopter was flying at a lawful height. The court found that although Riley may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, his expectation that its contents would not be examined from a helicopter hovering below 500 feet was not unreasonable.

The court contended that the helicopter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. The court opined that helicopters were more susceptible to abuse and invasion of privacy than ground surveillance or surveillance by fixed-wing aircraft. Based on the concern for technological advances expressed in Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the surveillance by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

REASONS FOR GRANTING THE WRIT

1. WHETHER GROUND OBSERVATIONS FROM A HELICOPTER AT A LAWFUL ALTITUDE OF 400 FEET OVER RESIDENTIAL BACKYARDS VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT?

The Florida Supreme Court has followed the California Court of Appeals' decision in People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), cert. denied, 107 S.Ct. 2200 (1987), and determined that a police officer cannot constitutionally view marijuana plants contained in a defendant's curtilage from a helicopter flying at a lawful altitude of 400 feet.[1]

1/ The case below rested on the 4th Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. This section of the Florida Constitution requires that search and seizure cases be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court. Thus, This contention conflicts with this Court's holding in California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986).

Ciraolo makes it clear that because an area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. Ciraolo, 90 L.Ed.2d at 216, citing United States v. Knotts, 460 U.S. 276, 282 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, at 351 (1967).

The fact that the Fourth Amendment may protect against entry in the absence of probable cause or a warrant does not mean that the Constitution erects a barrier to visual observation from areas open to the public. See, e.g., Texas v. Brown, 460 U.S. 730 (1983) (looking into an automobile); United States v. Santana, 427 U.S. 38 (1976) (observing individual in doorway of her home); United States v. Lee, 274 U.S. 559 (1927) (looking onto a boat dock). This conclusion is particularly apt in the case of the common law concept of curtilage, which originated in the course of defining what intrusions into the area of the home would constitute a burglary (see 4 W. Blackstone,

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jurisdiction rests in this Court based on both the 4th Amendment and Article I, Section 12. See, Oliver v. United States, 466 U.S. 170 (1984).

Commentaries on the Laws of England ch. 16, at 255 (Univ. of Chicago Press ed. 1979)); the notion of curtilage focuses on physical entry, not freedom from observation.

In United States v. Karo, 468 U.S. 705 (1984), and United States v. Knotts, 460 U.S. 276 (1983), the Court considered the Fourth Amendment implications of police monitoring of a "beeper" transmitting signals from, in, or near a privately owned building. The Court found manifestly unobjectionable the use of a beeper to obtain information available from visual surveillance, even if that surveillance extended up to the door of a residence. See Karo, 468 U.S. at 714; Knotts, 460 U.S. at 281-282, 285. The only Fourth Amendment problem arose from the use of the beeper "to obtain information that it could not have obtained by observation from outside the curtilage of the house"

Karo, at 715. In sum, the fact that government officials may lack authority in a given situation to enter the curtilage of a residence does not prevent them from standing outside the curtilage and looking inside to observe what is exposed to their view from that vantage point. See also Fullbright v. United States, 392 F.2d 432, 434-435 (10th Cir.), cert. denied, 393 U.S. 830 (1968)

Accordingly, this Court readily concluded in Ciraolo that where any member of the public flying at a lawful altitude who glanced down could have seen everything that these officers observed respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor. Id, 90 L.Ed.2d at 217.

It is clear that any helicopter pilot or passenger lawfully flying in this airspace could have seen everything that these officers observed.

Nevertheless, the court below opines that although respondent may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents would not be examined from a helicopter hovering below 500 feet.

The court concludes that because the surveillance was from a helicopter rather than an airplane, and was at 400 feet rather than 1000 feet (nevertheless conceding that the helicopter was flying at a permissible height) that the overflight violated Riley's reasonable expectation of privacy because it was below navigable airspace.

These are distinctions without differences that make it readily apparent the Florida Supreme Court merely disagrees

with this Court's decision in Ciraolo.

Petitioner contends that in terms of the Fourth Amendment helicopters are not distinguishable from airplanes and that "lawful flight" and "navigable airspace" are synonymous.

Navigable airspace is defined in 49 United States Code section 1301 (29), to wit:

> "(29) 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft."

In 14 Code of Federal Regulations section 91.79 the minimum altitudes for flight in navigable airspace are defined as:

> "§91.70 **Minimum safe altitude; general.**
>
> "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

> "(a) **Anywhere.** An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> "(b) **Over congested areas.** Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> "(c) **Over other than congested areas.** An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> "(d) **Helicopters.** Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Thus, navigable airspace under the regulations is anywhere that would not constitute undue hazard to persons or property on the surface. (14 C.F.R., §91.79(a) and (c).) A helicopter flying at an altitude of 400 feet is in lawful flight within navigable airspace.

Even assuming this helicopter was not in navigable airspace, the flight in the instant case was not a violation of the Fourth Amendment because the flight was lawful under the federal regulations.

Congress's establishment of a public right to freedom of transit necessarily constitutes a decision in favor of the social and economic advantages of relatively unrestrained aviation at the expense of the loss of some degree of privacy from airborne observation. That privacy has been lost to the public, and it cannot be recaptured by reading the Fourth Amendment to impose special limitations upon the viewing ability of government officials.

Riley suggests that helicopters are

more offensive to Fourth Amendment rights than fixed wing aircraft because the helicopter can lawfully and safely fly at lower levels than airplanes. The court also distinguishes the helicopter based on its ability to hover, thereby allowing the helicopter passenger a better opportunity to view an individual's private activities.

Based on its reading of Katz v. United States, 389 U.S. 350 (1967), the Florida Supreme Court attempts to remove the helicopter flying at a lawful altitude from law enforcement's arsenal of crime fighting tools. In the opinion below, the court stated:

> . . . Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a technological advance, we believe it is more susceptible to abuse and invasion of privacy than ground surveillance.
>
> * * *

> Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities.
>
> * * *
>
> Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy.
>
> * * *
>
> We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft.

Riley, (A-21-23).

The use of helicopters is not a futuristic technological advance such as concerned the court in Katz. As this Court said in Ciraolo:

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites omitted) were plainly not aimed at simple visual observations from a public place."

* * *

> "One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Further, the court's premise that the use of technology by law enforcement offends fourth amendment principles is unsupported in the instant case. In United States v. Knotts, 460 U.S. 276 (1983), this Court stated:

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Accordingly, the Florida Supreme Court's reliance on Katz, supra, to find a

fourth amendment violation in this case is simply misplaced. Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation has not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217.

The court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to this Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, this Court in Ciraolo also made it clear that a focused surveillance does not violate fourth amendment rights against search and seizure.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes

searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). And, as this Court recognized in United States v. Knotts, 460 U.S.276 (1983):

> But the fact is that the "reality hardly suggests abuse," Zurcher v. Stanford Daily, 436 U.S. 547, 566, 56 L.Ed.2d 525, 98 S.Ct. 1970 (1978); if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Ibid. Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Id at 283-284.

Nothing in this case suggests that any reasonable expectations of privacy have been infringed.

Detective Gell was flying at a lawful

altitude and made an observation that any member of the public lawfully flying in this airspace could have made. Cf. Ciraolo, 90 L.Ed.2d at 217. Before making any physical intrustion into the curtilage the detectives obtained a warrant to enter Riley's premises and seize the contraband. Riley's Fourth Amendment rights were not violated.

CONCLUSION

This Court should grant the instant petition and summarily vacate the lower court's decision based on Ciraolo, supra. Alternatively, the Court should grant the petition and order plenary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PEGGY A. QUINCE, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on this ________ day of November, 1987, I served three copies of the Petition for Writ of Certiorari on MARC H. SALTON, Esquire, 4911 C. R. 54, New Port Richey, Florida 33552, by a duly addressed envelope with postage prepaid.

____
OF COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

Order of Florida Supreme Court denying Motion for Rehearing A-1

Opinion of the Florida Supreme Court A-2

Opinion of the District Court of Appeal, Second District A-31

Motion to Suppress filed in the Circuit Court A-42

Order of the Circuit Court granting Defendant's Motion to Suppress A-46

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IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 11, 1987

MICHAEL A. RILEY, **

Petitioner, **

vs. ** CASE NO. 67,906

STATE OF FLORIDA, ** District Court of Appeal, 2d District - No.

Respondent. ** 84-2818

On consideration of the motion for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy
TEST:
C

cc: Hon. William A. Haddad, Clerk
Hon. Joseph E. Pittman, Clerk

Sid J. White
Clerk Supreme Court

Hon. Hon. W. Lowell Bray, Jr., Judge

Candance M. Sunderland, Esquire
Marc H. Salton, Esquire

By: /s/
Chief Deputy

SUPREME COURT OF FLORIDA

No. 67,906

MICHAEL A. RILEY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[July 9, 1987]

BARKETT, J.

We have for review State v. Riley, 476 So.2d 1354 (Fla. 2d DCA 1985), in which the district court upheld the validity of a seizure of marijuana under a search warrant obtained as the result of aerial surveillance and certified the following as a question of great public importance:

> WHETHER POLICE OFFICER, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

Because the certified question as stated contains language inconsistent with established search-and-seizure analysis, we restate the question as follows:

> WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

The issue here is one of first impression in this state and one which obviously involves serious questions of public policy. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, answer the restated question in the affirmative, and quash the decision of the district court below.

Petitioner, Michael A. Riley rented approximately five acres of rural property on which was located a mobile home which petitioner used as a residence. The greenhouse in question was located ten to twenty feet behind the mobile home. Both buildings were enclosed by a net wire fence. A "DO NOT ENTER" sign was posted in front of the mobile home. The greenhouse was enclosed on two sides; the remaining sides were obscured by trees and shrubbery within the fenced area and the mobile home. Two panels were missing from the roof of the greenhouse, exposing approximately one-tenth of the roof area.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon an anonymous tip that marijuana was being grown on petitioner's property, went to investigate. Unable to discern the contents of the greenhouse from the road, Deputy Gell obtained a helicopter and flew over petitioner's property at about 400 feet.[1] Through the openings in the roof and through one or more of the open sides of the greenhouse, he saw what he believed to be marijuana. Based upon his observations from the helicopter, Deputy Gell then obtained a warrant to search the greenhouse.[2]

The search warrant was executed and forty-four marijuana plants were found growing in the greenhouse. Petitioner was charged with unlawful possession and manufacture of marijuana under section 893.13,

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[1] The evidence was unclear as to whether the helicopter descended below 400 feet. The helicopter did circle over the greenhouse twice. Riley, 476 So.2d at 1355.

[2] Although Deputy Gell also took photographs of the greenhouse from the air, the trial judge apparently accepted his statement that he identified the marijuana from the air and not from the photographs. Riley, 476 So.2d at 1355.

Florida Statutes (1983). The trial court granted petitioner's motion to suppress the evidence on the ground that petitioner manifested a reasonable expectation of privacy from aerial surveillance. On appeal, the Second District reversed on the authority of its own decision in Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984),[3] and certified the issue to the Court.

Petitioner, relying on Katz v. United States, 389 U.S. 347 (1967), contends that the aerial surveillance of his greenhouse was a search in violation of his rights under the fourth amendment to the United States Constitution and article I, section 12 of the Florida Constitution. The state counters that the surveillance was a legally permissible "preintrusion view" in

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[3] In that case, the district court certified a similar question to the Court, but the parties did not pursue the issue. Randall, 458 So.2d at 826.

accordance with this Court's decision in State v. Rickard, 420 So.2d 303 (Fla. 1982), and the Second District's decision in Randall v. State. We agree with petitioner that under the facts of this case the helicopter surveillance by the state constituted a search and an impermissible violation of privacy rights.

We begin our analysis with two recent United States Supreme Court decisions involving aerial surveillance, California v. Ciraolo, 106 S.Ct. 1809 (1986), and Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986).[4]

In Ciraolo, police flew over the defendant's property in a fixed-wing plane at a height of 1,000 feet to confirm an anonymous tip that the defendant was growing marijuana in his backyard. The property was surrounded by a ten foot high fence, preventing ground level observation. In Dow Chemical, a government regulatory agency took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000, and 1,200 feet. Extensive security prevented any public viewing of the facility.

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[4] These cases were decided after the decision of the Second District below.

The Court reaffirmed the standard established in Katz and then applied the Katz test to the aerial surveillance which had occurred in each case. Under the Katz standard, the legality of a warrantless police intrusion into allegedly private activities depends upon whether a person has a "reasonable" expectation of privacy in the invaded area. Id., 389 U.S. at 360 (Harlan, J., concurring). In Katz, the Supreme Court abandoned the traditional analysis which defined a search by reference to whether the police had committed a physical trespass, see Olmstead v. United States, 277 U.S. 438 (1928), and shifted

the focus to whether the government had violated the privacy upon which the individual had justifiably relied. Katz, 389 U.S. at 353. Recognizing that the "constitutionally protected areas" approach provided no real protection against surveillance techniques made possible through advancing technology, the Court made clear that "the Fourth Amendment protects people, not places."[5] Id. at 351-52. Thus, "[w]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id.

Katz and its progeny established a two-pronged test for determining whether the government has intruded upon an individual's reasonable expectation of privacy. First, an individual by his conduct must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)); Norman v. State, 379 So.2d 643, 647 (Fla. 1980).

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[5] This does not mean that the location of the observed activities or objects has no bearing on search-and-seizure analysis. The question whether a legitimate expectation of privacy has been invaded generally requires reference to a place. Katz, 389 U.S. at 361.

The Ciraolo court, having determined that the yard in question was within the curtilage of the defendant's home, found that "[c]learly--and understandably--" the defendant had met the test of manifesting his own subjective intent and desire to maintain privacy. 106 S.Ct. at 1811. The Court noted that the protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home both physically and psychologically "where privacy expectations are most heightened." Id. at 1812.

The inquiry in Ciraolo thereafter centered on the second prong of Katz, specifically, "whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." Id. at 1812. The Court decided that the expectation was not reasonable where:

> The observations . . . took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they [the police] were able to observe plants readily discernable to the naked eye as marijuana. . . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

106 S.Ct. at 1813 (emphasis supplied, citation omitted).

In Dow Chemical, decided the same date as Ciraolo, the Court upheld the warrantless taking of aerial photographs, again limiting its holding to observations made from public navigable airspace:

> We conclude that the open areas of an industrial plant complex . . . are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; . . . such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 1827 (footnote omitted). The Court also rested its conclusion on the fact that the area at issue was not an area immediately adjacent to a private home, where privacy expectations are most heightened, nor an area where Dow had made any effort to protect against aerial surveillance. Id. at 1826 n.4.

In light of Ciraolo and Dow Chemical, we believe the state's reliance on Rickard

is misplaced. Rickard did not deal with aerial surveillance such as we have here nor with any other modern surveillance technologies against which a citizen can do little to protect. In Rickard, police were lawfully in a neighbor's orange grove when they observed marijuana growing in Rickard's backyard. The plants were open to naked-eye view by any casual observer. Clearly, Rickard had made no attempt to prevent observations from the orange grove and, therefore, had not exhibited a reasonable expectation of privacy in his backyard from naked-eye observations from neighboring property. Accordingly, we held that the police observations in that case were not a search but were a legally permissible "preintrusion view" which occurs when a police officer who is located where any citizen has a right to be can look into the protected area and, in a reasonable manner, observes contraband. Rickard, 420 So.2d at 305; Ensor v. State, 403 So.2d 349, 352 (Fla. 1981).[6] Such observations are generally permissible because an individual has no expectation of privacy in objects or activities knowingly exposed to the public. See Katz, 389 U.S. at 351.

Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private

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[6] Because the police are not already legally within the protected area when the observation is made, they must obtain a warrant before entering the protected area to seize the contraband. A "preintrusion view" is thus different from the "plain view" exception to the fourth amendment's warrant requirement established in Coolidge v. New Hampshire, 403 U.S. 443 (1971). See Ensor. Under the "plain view doctrine," when police legally within a constitutionally protected area observe, without the benefit of a search, evidence which they have probable cause to believe is contraband, they may seize it without a warrant.

activities do not lose their fourth amendment protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point. See, e.g. Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (protracted surveillance of contents of greenhouse with telescopes and lenses of increasing magnitude constitutes a search). Wherever an individual harbors a "reasonable expectation of privacy," he or she is entitled to be free from unreasonable government intrusion.[7]

We turn now to the case at hand. As in Ciraolo, there is no question in this case that the first prong of the Katz test has been met. Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earthbound and aerial observation. The fact that a few panels in the roof were missing does not alter our conclusion. Similar efforts have been held to establish a subjective expectation of privacy, and thus to satisfy the first prong of Katz. See e.g., People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986) (reasonable expectation of privacy in greenhouse partially screened by evergreens and from which some roof and side panels were missing), cert. denied, 107 S.Ct. 2200 (1987); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977) (reasonable expectation of privacy in hothouse located on residential premises even though plastic covering may have allowed someone to look in from the outside); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980) (defendant's covering of greenhouse with materials so as to shield contents demonstrated subjective expectation of privacy); Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (subjective expectation of privacy in greenhouse despite four foot square louvered opening for purpose of ventilation).

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[7] Accordingly, we have restated the certified question to avoid the implication that an alleged search might be valid despite the finding that both prongs of the Katz test have been satisfied, to wit, that the appropriately manifested expectation of privacy in the area searched was reasonable.

Moreover, as in Ciraolo, we find that the area in question constituted the curtilage. State and federal courts have long recognized that the curtilage concept extends to residential backyards and outbuildings located within close vicinity of the residence. Taylor v. United States, 286 U.S. 1, 6 (1932); United States v. Williams, 581 F.2d 451, 454 (5th Cir.

1978), cert. denied, 440 U.S. 972 (1979); Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955); State v. Rickard, 420 So.2d 303, 306 (Fla. 1982); Norman v. State, 379 So.2d 643 (Fla. 1980); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977); Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974); State v. Fierge, 673 S.W.2d 855, 856 (Mo.App. 1984); Brown v. Oklahoma City, 721 P.2d 1346, 1349 (Okla. App. 1986).

Traditionally, the fourth amendment provides a high degree of protection to the curtilage of a residence, those areas "immediately adjacent to the home" to which extend "the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life' [citation omitted] . . ." Oliver v. United States, 466 U.S. 170, 180 (1984). Indeed, the curtilage "has been considered part of [the] home itself for Fourth Amendment

purposes . . ." Id. at 170. The reason for this was expressed well by the Sixth Circuit in Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984):

> The doctrine of curtilage is grounded in the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home. The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is . . . true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place.

We are left with the question of whether the observation from the air in this case violates an expectation of privacy that is reasonable.

After Ciraolo, there is little question that naked-eye observations of marijuana growing in an enclosed backyard from fixed-wing aircraft within navigable airspace do not violate the federal constitution. However, we do not read Ciraolo as sanctioning an unlimited right to any type of examination of residential property from the air. Indeed, we note the care taken to qualify and limit the permissible observation to the "naked eye" from "navigable air space" at an "altitude of 1000 feet" in a "physically nonintrusive manner."[8]

These are not the facts presently before us. We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in a roof.

As we already have noted, Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a technological advance,[9] we believe it is more susceptible to abuse and invasion of privacy than ground surveillance. As the California Supreme Court recognized in People v. Cook, 41 Cal.3d 373, 382, 221 Cal.Rptr. 499, 505, 710 P.2d 299, 305

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[8] In a footnote to its conclusion, the Court noted that the state conceded that "'[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" Ciraolo, 106 S.Ct. at 1813-14 n.3.

[9] At least one court has so held. United States v. Broadhurst, 805 F.2d 849, 853 n.3 (1986). But see State v. Myrick, 102 Wash.2d 506, 688 P.2d 151 (1984) (rejecting the contention that aircrafts generally are overly intrusive technological devices when used for surveillance purposes).

(1985), the concept of protected areas has little meaning when it comes to aerial surveillance:

> Purposeful surveillance from the air simply lays open everything and everyone below--whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs-- to minute inspection. The usual steps one might take to protect his privacy are useless.

Surveillance by helicopter is particularly likely to unreasonably intrude upon private activites. The first court to find aerial surveillance unconstitutional did so because the police hovered in their helicopter twenty to twenty-five feet above the ground and 125 feet away from appellant's residence in an effort to identify marijuana in a corral. People v. Sneed, 32 Cal.App.3d 535, 108 Cal.Rptr. 146 (1973). Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observa-

tional capabilities, helicopter surveillance poses a serious risk to privacy. See National Organization For Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945 (M.D.Cal. 1985) (highly disruptive character of low helicopter flights distinguishes them from common airplane overflights to which society is accustomed), remanded, 796 F.2d 276 (9th Cir. 1986). In People v. Sabo, 185 Cal. App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), the court invalidated a warrantless aerial search under circumstances nearly identical to those here. Noting that helicopters may lawfully be operated in nonnavigable airspace,[10] the court concluded that such lawful operation did not fall within the aerial surveillance approved in Ciraolo and Dow Chemical. In reaching this conclusion, the court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft:

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[10] The Sabo court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes,

> To say any sighting from a helicopter in nonnavigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed . . . [whereas] [t]he lawfully operated helicopter need stand back only such distances as not to hazard persons or property.

Id. at 175-76.

We do not believe that the details

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and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. §91.70(d) (1986). 23 Cal.Rptr. at 174-75.

observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. Cf. Ciraolo, 106 S.Ct. at 1813. The possibility of observation of the interior of a greenhouse by passengers on commercial and private aircraft in the public airways is extraordinarily remote. Even more remote is the possibility that an observer would connect what he or she observed to a specific person. Although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet.

We are not unmindful of the legitimate law enforcement interests at stake here; we simply do not find the governmental intrusion in this case necessary to advance those objectives. We believe law enforcement can achieve its objectives without so infringing upon the privacy rights of Florida citizens.

The fourth amendment reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14 (1948). Our own right to privacy amendment, article I, section 23, Florida Constitution, was meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques. See Constitution Revision Commission proceedings (July 6, 1977) (address by Chief Justice Ben Overton); see also Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 F. S.U. L.Rev. 671, 721-22 & 759 (1978). As

United States Supreme Court Justice Brennan observed in United States v. Dunn, 107 S.Ct. 1134 (1987) (Brennan, J., dissenting), the fourth amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wish to guard against their privacy. We believe the intrusion in this case is such a burden.

There is little that an individual can do to bar either the public or police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to fourth amendment protection. We cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken the extraordinary steps required to protect against all types of aerial surveillance.[11] The right to be let alone includes not only the right to be free from surveillance within the confines of four walls and a roof but also the right to enjoy outdoor activities in private in one's own backyard. See State v. Ward, 62 Haw. 509, 517, 617 P.2d 568, 573 (1980) (constitution does not require person to shut himself off from "fresh air, sunlight and scenery"); Wheeler, 659 S.W.2d at 390 (constitution does not require that one erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy).

Recognizing that the question in this case is a close one, we think the Supreme Court's admonition of over a century ago bears repeating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

Boyd v. United States, 116 U.S. 616, 635 (1886).

Accordingly, we find that petitioner had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers. In circling and descending below "public navigable airspace," Detective Gell impermissibly invaded Riley's privacy and his observations thus constituted a search under the fourth amendment to the federal constitution and article I, section 12 of the Florida Constitution. We, therefore, quash the decision of the Section District and remand for reinstatement of the trial court's suppression order.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH AND SHAW, JJ., and ADKINS, J. (Ret.), concur

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[11] To require persons to erect such barriers is akin to requiring people to install lead insulation to protect against x-ray surveillance of their homes.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 84-2818

Marc H. Salton, New Port Richey, Florida,
for Petitioner

Robert A. Butterworth, Attorney General and Candance M. Sunderland, Assistant Attorney General, Tampa, Florida,
for Respondent

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED,
DETERMINED.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,)
Appellant,)
)
v.) CASE NO. 84-2818
)
MICHAEL A. RILEY,)
)
Appellee.)

Opinion filed October 16, 1985.

Appeal from the Circuit Court for Pasco County; W. Lowell Bray, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Candance M. Sunderland, Assistant Attorney General, Tampa, for Appellant.

Marc H. Salton, New Port Richey, for Appellee.

GRIMES, Acting Chief Judge.

This appeal passes on the validity of a seizure of marijuana under a search warrant obtained as a result of aerial surveillance.

On appellant's motion to suppress, the trial court entered a comprehensive order which reads as follows:

ORDER

THIS MATTER coming on to be heard on the 14th day of December 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs. The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This

building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view

of its contents. Likewise, the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Though not noted in his order, the trial judge, at the hearing, specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance.

On appeal, the state argues that this case must be reversed on the authority of Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984). We agree.

In order to fully appreciate the Randall decision, it is first necessary to discuss the case of State v. Rickard, 420 So.2d 303 (Fla. 1982). In Rickard, the police had seized marijuana from the defendant's back yard after having observed the contraband from an orange grove behind the defendant's property. Because the defendant had taken steps to block the

view of his back yard from his only adjacent neighbor, the supreme court held that the defendant had exhibited a reasonable expectation of privacy in that area and quashed the warrantless seizure. However, the supreme court specifically held that the officer's initial observation of the marijuana from the orange grove qualified as a legally permissible preintrusion open view rather than a search. The seizure of the marijuana was not quashed because of the officer's conduct in viewing the defendant's back yard from the nearby grove but because of his failure either to obtain a search warrant authorizing the seizure or to demonstrate an exception to the warrant requirement.

In Randall, the police received a tip that the defendant was growing marijuana behind his house, but the plants could not be observed from the ground because the back yard was surrounded by a reed fence. However, the police were able to identify the marijuana from the vantage point of a helicopter flying at a routine patrol altitude. After analyzing Rickard, the court concluded that the appellant had exhibited a reasonable expectation of privacy from view not only from the ground but also from the air despite the lack of any shielding from aerial observation. Notwithstanding, the court concluded that the aerial surveillance made by the police from a place where they had a legal right to be did not constitute a overnmental intrusion which rose to the level of an impermissible search. Thus, the police were entitled to use the information obtained from the aerial view as the basis for probable cause to obtain a search warrant. The court concluded:

> While the efforts undertaken by police officers in order to gain a view into a constitutionally protected area undoubtedly must be considered in determining

> the degree of governmental intrusion, we do not deem aerial observation alone to be unreasonably intrusive under the circumstances presented. Society appears willing to accept aerial surveillance as a reasonable and necessary investigative tool in effective modern law enforcement. Furthermore, we do not believe that requiring police to procure a warrant before executing an general aerial overflight such as that conducted in the instant case would significantly advance the protection of legitimate privacy interests. See Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (addressing, peripherally, aerial surveillance of an open field). In short, we conclude that the non-harassing surveillance conducted in the instant case struck an acceptable balance between society's interest in effective modern law enforcement and the individual's interest in the values protected by the fourth amendment.

458 So.2d at 825-826.

The instant case differs from Randall only in the fact that the appellant had erected a roof over most of his greenhouse. Consequently, this provided a basis for the judge to conclude that appellant had demonstrated a reasonable expectation of privacy from aerial surveillance. However, the Randall case was decided on the same principle because the court acknowledged that by having fenced his property from ground observation, it was unnecessary for the defendant to construct an "opaque bubble" over his back yard in order to manifest a reasonable expectation of privacy, even from aerial surveillance. Therefore, appellant's effort to cover his greenhouse from aerial observation becomes an irrelevant distinction from Randall.

Recognizing that its interpretation was one of first impression in Florida, the Randall court certified a question to the supreme court. Since the parties did not further pursue the case, there is no supreme court authority on the subject. Hence, we certify the following question to the supreme court as one of great public importance:

> WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

REVERSED.

FRANK and HALL, JJ., Concur.

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA, IN AND FOR
PASCO COUNTY

8401606CFAWS

STATE OF FLORIDA :
:
vs. :
:
MICHAEL A. RILEY :

MOTION TO SUPPRESS

COMES NOW the Defendant, MICHAEL A. RILEY, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure and hereby moves this Honorable Court for an Order suppressing all quantities of marijuana seized from the defendant or his residence on August 16, 1984 and as grounds therefor would allege:

1. That on August 16, 1984 officers of the Pasco County Sheriff's Department secured a search warrant for the residence of the defendant.

2. Pursuant to the execution of the search warrant several quantities of marijuana were seized from the defendant's residence and property.

3. Prior to securing said search warrant, Deputy Robert Longworth, Pasco County Sheriff's Department, received information that marijuana was growing on the defendant's property.

4. Deputy Robert Longworth attempted to view marijuana from the roadway surrounding the defendant's property but could only see a greenhouse behind the defendant's trailer and could not tell what was growing within said greehouse [sic].

5. Officers of the Pasco County Sheriff's Department then flew a helicopter and hovering over the defendant's greenhouse, then attempted to view what was growing in said greenhouse through openings in the roof of said greenhouse.

6. Based on testimony that the

expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet.

We are not unmindful of the legitimate law enforcement interests at stake here; we simply do not find the governmental intrusion in this case necessary to advance those objectives. We believe law enforcement can achieve its objectives without so infringing upon the privacy rights of Florida citizens.

The fourth amendment reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14 (1948). Our own right to privacy amendment, article I, section 23, Florida Constitution, was

meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques. See Constitution Revision Commission proceedings (July 6, 1977) (address by Chief Justice Ben Overton); see also Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 F.S.U. L.Rev. 671, 721-22 & 759 (1978). As United States Supreme Court Justice Brennan observed in United States v. Dunn, 107 S.Ct. 1134 (1987) (Brennan, J., dissenting), the fourth amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wish to guard against their privacy. We believe the intrusion in this case is such a burden.

There is little that an individual can do to bar either the public or police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to fourth amendment protection. We cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken the extraordinary steps required to protect against all types of aerial surveillance.[11] The right to be let alone includes not only the right to be free from surveillance within the confines of four walls and a roof but also the right to enjoy outdoor activities in private in one's own backyard. See State v. Ward, 62 Haw. 509, 517, 617 P.2d 568, 573 (1980) (constitution does not require person to shut himself off from "fresh air, sunlight and scenery"); Wheeler, 659 S.W.2d at 390

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[11] To require persons to erect such barriers is akin to requiring people to install lead insulation to protect against x-ray surveillance of their homes.

(constitution does not require that one erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy).

Recognizing that the question in this case is a close one, we think the Supreme Court's admonition of over a century ago bears repeating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

Boyd v. United States, 116 U.S. 616, 635 (1886).

Accordingly, we find that petitioner had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers. In circling and descending below "public navigable airspace," Detective Gell impermissibly invaded Riley's privacy and his observations thus constituted a search under the fourth amendment to the federal constitution and article I, section 12 of the Florida Constitution. We, therefore, quash the decision of the Second District and remand for reinstatement of the trial court's suppression order.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH and SHAW, JJ., and ADKINS, J. (Ret.), concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 84-2818

Marc H. Salton, New Port Richey, Florida,

for Petitioner

Robert A. Butterworth, Attorney General and Candance M. Sunderland, Assistant Attorney General, Tampa, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. RILEY,)
Petitioner,)
v.) Case No. 67,906
STATE OF FLORIDA,)
Respondent.)

MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure, 9.330, Respondent moves for a rehearing of this Court's opinion of July 9th, 1987, on the grounds that this Court overlooked or misapprehended the following:

I.

Michael A. Riley did not exhibit a subjective expectation of privacy from aerial viewing.

And, the officers in the instant case were in a place where they had a right to

be when they spotted the contraband and accordingly, the viewing did not constitute a search within the context of the fourth amendment.

II.

As a basis for this Court's decision in Riley, the Court stated:

> Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earth-bound and aerial observation. The fact that a few panels of the roof were missing does not alter our conclusion.

Riley, page 7. (emphasis supplied).

The State does not agree that Riley exhibited a subjective expectation of privacy.

In California v. Ciraolo, 476 U.S. __, 90 L.Ed.2d 210, 106 S.Ct. __ (1986), the United States Supreme Court took care to note that it was not addressing the issue of whether Ciraolo had manifested a subjective expectation of privacy from all observations of his backyard, or whether he instead manifested merely a hope that no one would observe his unlawful gardening pursuits. Id. at 90 L.Ed.2d 216.

Petitioner's greenhouse was located in a rural area. The photographs included in the record on appeal show that approximately 1/8th of the roof was uncovered and of the remaining portion the contraband could be readily viewed through 1/2 of one side of the roof. The remaining roofing was made of white fiberglass covering which allowed light to enter the structure. Further, the building was enclosed only on two sides. One of the remaining sides was open to an area of trees and shrubbery and the fourth side was screened by a mobile home. The marijuana was clearly visible through the roof and the sides.

Here, as in Ciraolo, the petitioner's actions manifested no more than a hope that no one would observe his unlawful gardening pursuits.

III.

In Riley, this Court concedes that the officers were in a place they had a right to be. Nevertheless, the Riley decision suggests that this is not determinative under Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

> "Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment

> protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point."

Id. at page 6.

First, Katz rested on a determination that the technology used allowed the officers to intercept a private conversation.

> "The critical facts in this case is that '[o]ne who occupies it, [a] telephone booth shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 582. The point is not that the booth is 'accessible to the public' at other times, ante, at 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

Katz, at 361.

Nothing in the Katz opinion suggests that Katz' fourth amendment rights would have been violated had the officers simply overheard the conversation while standing outside the phone booth. In other words,

had the officers been in a place where they had a right to be, rather than intruding into the occupant's expectation of privacy, there would not have been a search within the context of the fourth amendment.

This Court, nevertheless, holds that even though the officers were in a place they had a right to be, the overflight was a violation of petitioner's reasonable expectation of privacy. Riley concludes that the officers were not in public navigable airspace because the helicopter was below the 500 foot minimum for fixed-wing aircraft in a non-congested area. Accordingly, the opinion urges that although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents would not be examined from a helicopter hovering below 500 feet.

This conclusion is contrary to the Supreme Court's decision in Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986). The officers here and the officers in Dow were in a place they had a right to be. The camera used by the agents in Dow allowed them to observe the Dow Chemical Plant at a closer point than a mere 1,000 feet. The maneuverability of the helicopter also allowed the officers in the instant case to observe Riley's greenhouse from a closer point that [sic] 1,000 feet.

Nevertheless, this Court in Riley attempts to distinguish the two based on the intrusive nature of the helicopter itself.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and

circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

Further, as the Court noted in Katz:

> "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just

> as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home."

Katz, 389 U.S. 350. fn.4, citing Griswold v. Connecticut, 381 U.S. 479 (dissenting opinion of Mr. Justice Black).

Thus, while the camera used in Dow may have been more surreptitious than the presence of a helicopter, this is a distinction without difference.

Further, from a technological standpoint, the concept of a helicopter was developed by Leonardo D[a]Vinci in the 15th century and helicopters have been in use since the first quarter of this century. The use of helicopters is not a futuristic technological advance such as concerned the court in Katz.

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites

> omitted) were plainly not aimed at simple visual observations from a public place."

* * *

> "One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Beyond the fact that there is little support for this Court's conclusion that for an aerial viewing to be proper it must be from above minimum altitude levels for fixed-wing aircraft, there is also little support for this Court's conclusion that the helicopter in the instant case was not in public navigable airspace. See, 14 C.F.R § 91.79(d), 49 U.S.C.A. § 1301(26), and Griggs v. Allegheny County, 369 U.S. 84, 7 L.Ed.2d 585, 82 S.Ct. 531, rehr'g denied, 369 U.S. 857, 8 L.Ed.2d 16, 82 S.Ct. 931 (1962); see also, California v. Sabo, 95 L.Ed.2d 855 (1987) (White, B., dissenting)

(Court of Appeals holding that helicopter was not in navigable airspace at 400 feet is questionable.). In either case, the fact remains that the officers in the instant case were in a place that they had a right to be and could plainly spot the contraband without the aid of a 'futuristic technological development'.

This Court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to the Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, the Court in Ciraolo also made it clear that a focused

surveillance does not violate fourth amendment rights against search and seizure.

It is clear that any helicopter pilot or passenger properly flying in this airspace could have seen everything that these officers observed. Based on similar facts, the Court in Ciraolo readily concluded that respondent's expectation that his garden was protected from such observation was unreasonable and was not an expectation that society was prepared to honor.

Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation has not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217.

Accordingly, this Court has overlooked and misapprehended the fact that petitioner did not exhibit a subjective expectation of privacy that no one would observe his unlawful gardening pursuits, and that because the officers were in a place they had a right to be when they spotted the contraband, the overflight did not constitute a search within the context of the fourth amendment.

WHEREFORE, based on the foregoing reasons and citations of authority, respondent respectfully prays this Honorable Court to grant the instant Motion for Rehearing and reverse its decision.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Marc H. Salton, Esquire, 4911 C.R. 54, New Port Richey, Florida 33552, this 23rd day of July, 1987.

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IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 11, 1987

MICHAEL A. RILEY,)

Petitioner,)
CASE NO. 67,906
vs.)
District Court
STATE OF FLORIDA,) of Appeal, 2d
District - No.
Respondent.) 84-2818

On consideration of the motion for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme
Court

C
cc:
Hon. William A. Haddad, Clerk
Hon. Joseph E. Pittman, Clerk
Hon. Hon. W. Lowell
Bray, Jr., Judge

Candance M. Sunderland,
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By: /s/
Chief Deputy

IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 25, 1987

MICHAEL A. RILEY,)

Petitioner,)
CASE NO. 67,906
vs.)
District Court
STATE OF FLORIDA,) of Appeal, 2d
District - No.
Respondent.) 84-2818

On consideration of the motion to recall mandate in the above cause filed by attorney for respondent,

IT IS ORDERED that the proceedings in this Court, the District Court of Appeal, Second District, and the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, are hereby stayed to and including October 12, 1987, to allow respondent to seek review in the Supreme Court of the United States and to obtain any further stay from that Court.

A True Copy
TEST:

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041888

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Supreme Court, U.S.
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APR 30 1988
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NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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April 29, 1988

QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> Whether the Florida Supreme Court's holding -- that ground observations from a helicopter at a lawful altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment -- conflicts with California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

This question may be rephrased:

1. Whether this Court should decide that warrantless naked-eyed aerial observation is permissible under the Fourth Amendment so long as the police observer has the legal right to be in the place from which the observation is made.
2. Whether this Court should reject the rules suggested by the Florida Supreme Court as to warrantless naked-eye aerial observations that:

- An observation from a fixed-wing aircraft in space where it may lawfully be is constitutional but an observation from a helicopter in space where it may lawfully be is not; and
- An observation made on a casual patrol is constitutional but an observation made on a purposeful patrol "targeted" on specific marijuana cultivating operations is not.

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NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as Riley v. State, 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled State v. Riley, is reported at 476 So. 2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit Court for Pasco County on pretrial motion to suppress (J.A.

92-98), styled State v. Riley, is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

JURISDICTION

This Court has jurisdiction to review the decision of the Florida Supreme Court on writ of certiorari under 28 U.S.C. § 1257(3). The decision of the Florida Supreme Court, quashing the decision of the Florida District Court of Appeal and remanding this case for reinstatement of the trial court's suppression order, was rendered on July 9, 1987. J.A. 110. After denial of its motion for rehearing, Florida filed a petition for a writ of certiorari, which this Court granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. It provides, in part:

> Section 1 - No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses,

> papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places or be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

49 U.S.C. § 1301(29), relied upon by the Florida Supreme Court, provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on

> the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

STATEMENT OF THE CASE

The trial court made a succinct statement of facts, which the District Court of Appeal reprinted verbatim:

> The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.
>
> The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.
>
> The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is

> open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.
>
> Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400

> feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.
>
> On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

J.A. 92-95, reprinted in J.A. 100-102.

Certain other facts (or the lack thereof) seem relevant, as may be gleaned from the minimal record.[1]

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[1] The record consists of the fifty-page transcript of the suppression hearing (J.A. 11-91) (much of it legal argument), at which only the deputy sheriff, Kurt Gell, and the defendant, Michael Riley, testified and documentary evidence consisting of a number of photographs (two of which were taken from the air, the balance being taken from the ground after a search warrant was obtained and executed).

a. Deputy Gell had over 14 years experience as a police officer, had observed marijuana as a police officer 100 times, and had in unrelated investigations observed marijuana in the course of aerial observations from airplanes or helicopters on approximately six prior occasions. J.A. 38.

b. The marijuana plants observed here were, in the words of the prosecutor, "at least the height of this greenhouse, [plants] approximately six to twelve feet tall." J.A. 78-79 (emphasis added). This statement is fully supported by the photographic exhibits. See, e.g., Def. Ex. 6; State's Ex. 17.

c. As the trial court found, 10% of the top of the greenhouse was exposed to Deputy Gell's view, the opening apparently being caused by the conscious act of "removing or not installing" part of the roof. Furthermore, two of the four sides of the greenhouse were open to the air. J.A. 42-43, 93-94, 101.

d. As the District Court of Appeal noted, Deputy Sheriff Gell testified and the trial judge "specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance." J.A. 88, 104; see J.A. 24, 26, 29-31, 34. In other words, although the deputy took two aerial photographs using a camera with a telephoto lens, he could see these 6-12 foot plants with his naked eye.[2/]

e. The only direct evidence of a subjective intention to conceal the marijuana cultivating operations was the "DO NOT ENTER" sign noted by the trial judge. Riley did not testify as to his subjective

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[2/] The Florida Supreme Court noted this factual ruling. J.A. 113 n. 2.

intent or desire. The Florida courts inferred a subjective intent from the net wire fence around (or partially around) the perimeter of the over five-acre tract, the enclosure of two sides, the partial obscuration of the other two sides, and the corrugated roofing of most of the top of the greenhouse.

f. Riley had an oral lease on the over five-acre tract. J.A. 47-48. After moving into the mobile home on the property, he himself built the greenhouse near the mobile home. Id.

g. There was no evidence as to the type of helicopter involved or its capacity to hover. In fact it did not hover, but instead, as the trial court found (J.A. 94-95), it circled the greenhouse twice. J.A. 32.

h. There was no evidence that Deputy Gell photographed any property but Riley's.

None of the photographs shows anyone else's property (nor, considering the size and rural nature of the property, would that have been likely).

i. The Florida Supreme Court made four statements about aerial observation. None was based on any record evidence:

1. aerial surveillance is "more susceptible to abuse and invasion of privacy than ground surveillance. . . . " (J.A. 130);

2. helicopter surveillance is "particularly likely to unreasonably intrude upon private activities. . . ." (J.A. 130);

3. helicopters' "virtually unlimited maneuverability and operational capabilities" invade privacy (J.A. 131); and

4. those justices "do not believe" one could "as easily" see what was seen here from a fixed-wing aircraft as from a helicopter. J.A. 133.

Riley was charged by information on August 16, 1984 with two counts of violating Section 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). J.A. 3-6. Riley filed a motion to suppress evidence, asserting the warrantless aerial observation constituted a "search." J.A. 7-10.

Despite this rather simple and straightforward factual framework, the three Florida courts below reached exceedingly different legal conclusions.

The trial court, writing in December 1984, granted the motion to suppress (J.A. 91-98), holding Riley had "exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the [Florida] Declaration of Rights." J.A. 95. The trial court further observed, "Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area." J.A. 95-96. While concluding, "Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance" (J.A. 96-97), the trial court expressly did "not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area." Id.

The District Court of Appeal, writing in October 1985, unanimously reversed the trial court's suppression order. J.A. 99-109. Finding the Fourth Amendment aerial surveillance question to be one of great public importance, the District Court certified it to the Florida Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(v).

Neither the District Court's nor the trial court's decisions, nor Riley's motion or briefs in these courts and the Florida Supreme Court, made any reference whatsoever to any federal "navigable airspace" statutory scheme or to any "minimum altitude" regulations. This was not an issue until the Florida Supreme Court spoke.

The Florida Supreme Court, writing in July 1987 (almost three years after the police aerial observations in question), unanimously quashed the District Court's decision and remanded with instructions to reinstate the trial court's suppression order.[3]

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[3] The decision below rested on the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. J.A. 111. This section of the Florida Constitution requires that the search and seizure provisions of the Florida Constitution be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by this Court. Since Florida law is dependent upon the construction given the Fourth Amendment, this Court has power to review the judgment of the Florida Supreme Court under Article I, Section 12. See,
(continued...)

Unlike the lower Florida courts, the Florida Supreme Court discussed this Court's decisions, including in particular (i) Riley's reliance on Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("Katz"), and (ii) this Court's two intervening Fourth Amendment decisions upholding warrantless aerial surveillance, California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("Ciraolo"), and Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) ("Dow").

In the Florida Supreme Court's view, Ciraolo and Dow, far from vindicating Florida, demonstrated its violation of Riley's Fourth Amendment privacy rights because the police helicopter here -- unlike the fixed-wing aircraft in those

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[3] (...continued) e.g., Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

cases -- had not been in "navigable airspace" as defined in the United States Code in pari materia with Federal Aviation Agency ("FAA") regulations (as interpreted by that court). For this holding, the Florida Supreme Court explicitly followed the intervening decision in People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (Cal. 4th Dist. Ct. App. 1986), cert. denied sub nom. California v. Sabo, ___ U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) ("Sabo").[4] On the basis of Sabo, the

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[4] Recently another California appellate court reached the opposite conclusion from Sabo (and the Florida Supreme Court here) on virtually identical facts. People v. Romo, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (Cal. 1st Dist. Ct. App. 1988), pet. for review denied (Cal. Apr. 27, 1988) (No. S004819) ("Romo"). Compounding the confusion, another division of the same appellate district that decided Romo followed Sabo. People v. Roberts, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987). (This latter case, however, construed the California Constitution before its amendment by "Proposition 8").

Florida Supreme Court explained its decision in terms of "navigable airspace."

Explicitly following Sabo "under circumstances nearly identical to those here," (J.A. 131-32), the Florida Supreme Court concluded, citing no factual basis, "Although petitioner [Riley] may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet." J.A. 133-34. "Recognizing that the question in this case is a close one, . . ." (J.A. 137), the decision below nevertheless held, "In circling and descending below 'public navigable airspace,'[5] Detective Gell impermissibly

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[5] The court stated the helicopter was not in public navigable airspace because (continued...)

invaded Riley's privacy and his observations thus constituted a search under the [F]ourth Amendment to the federal [C]onstitution and [A]rticle I, [S]ection 12 of the Florida Constitution." J.A. 137-38.

SUMMARY OF THE ARGUMENT

Florida, like most states,[6] is heavily dependent on use of aircraft to detect marijuana cultivating operations as the first step in their eradication. Florida draws no distinctions between types of aircraft used. Both fixed-wing aircraft and helicopters are utilized; both have their functions. In all cases, Florida intends that aircraft be operated lawfully under FAA regulations, that is, that they be piloted in areas where they legally may be. For fixed-wing aircraft this is in "navigable airspace" (1000 feet in urban, 500 feet in rural areas). For helicopters this is at less than the minimums of "navigable airspace," so long as without surface hazard to persons and property.

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[5] (...continued) it was below the minimum altitude level for fixed-wing aircraft. Based on the concern for technological advances expressed in Katz, supra, the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the observation by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

[6] See State of Indiana's Brief on behalf of itself and 29 other states and commonwealths as *amici curiae* filed this week in this case.

Florida submits that people today live in the constant presence of both fixed-wing aircraft and helicopters and can have no objectively reasonable expectation of privacy as to matters viewable by unaided vision from any aircraft positioned where it lawfully may be. Florida therefore asks that the decision below be reversed and a bright line rule be adopted that

warrantless naked-eye aerial observation is valid under the Fourth Amendment so long as the aircraft is operated where it lawfully may be.

A bright line rule is sought because police pilots require one and because the courts require one. A host of cases have tested the constitutionality of aerial observations. Confusion exists in the courts as to the rules for helicopters, as most clearly shown by three recent totally contradictory California court decisions and by the decision below. That decision, while purporting to follow this Court's decision in Ciraolo, effectively held helicopters cannot be used to conduct aerial observations unless they fly at minimums required only of fixed-wing aircraft. Under that decision, helicopters, unlike fixed-wing aircraft, may not observe from places where they lawfully may be.

The decision below utilized bright line rules, determining that aerial observations (i) from a helicopter flying below fixed-wing minimums, or (ii) as the result of a flight "targeted" on specific suspected property, are unconstitutional. Neither of these limiting bright line rules withstands analysis and both should be rejected.

The decision also concluded that marijuana cultivating operations exposed to the open-air near a trailer in which the cultivator resides, all on an over-five acre tract with a (possibly incomplete) perimeter fence rented by the cultivator on a verbal lease constituted part of the curtilage. Florida submits this conclusion is in error, is contrary to the basic rationale of curtilage, and under Ciraolo is not the relevant issue.

ARGUMENT

Introduction

This case may be characterized in various ways. How one characterizes this case may well determine the result. Such a result is undesirable just because it is so potentially unpredictable.

This is, for example, a "helicopter case" and the Florida Supreme Court has concluded there is -- for Fourth Amendment search purposes -- a constitutional difference between airplanes and helicopters.

This is also a "drug case," the target of the aerial observation being suspected marijuana cultivating operations of Riley. That this case involves alleged illegal manufacture and possession of marijuana theoretically should hold no special significance for constitutional and analytical purposes under the Fourth Amendment. Yet, empirically, it seems no coincidence that most aerial observation cases do involve marijuana cultivation--and increasingly also involve greenhouses and functional near-equivalents.

This is also one of a growing number of "greenhouse cases," in which police may utilize aerial observations of the contents of sheds and like structures not viewable from the ground.

Above all, this case is about the legitimacy of asserted or perceived expectations (subjective and objective) of privacy in a world where air traffic is omnipresent.

Aerial surveillance is a new application of the broad constitutional principles behind the prohibition of warrantless search and seizure. First alluded to in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), this Court

focused on the issue in *Ciraolo* and *Dow*.[7]

While the law reviews differ as to what factors ought to be taken into account, or are simply hostile to the idea of warrantless aerial surveillance altogether,[8] the academic search for meaningful criteria goes on.[9]

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[7] Note, *Aerial Surveillance Withstands Fourth Amendment Scrutiny*, 23 Tulsa L. J. 259, 281 (Wint. 1987).

[8] *See, e.g.*, Note, California v. Ciraolo, [106 S.Ct. 1809]: *The Demise of Private Property*, 47 La. L. Rev. 1365 (Jul. 1987); Note, *Search and Seizure -- Aerial Surveillance -- Administrative Inspections*-- Dow Chemical v. United States, 106 S.Ct. 1819, 27 Nat. Resources J. 693 (Summ. '87).

[9] *E.g.*, Note, *Constitutional Law-- Search and Seizure -- Warrantless Aerial Surveillance* -- California v. Ciraolo, 106 S.Ct. 1809 (1986), 54 Tenn. L. Rev. 131 (1986); Note, *Criminal Procedure--Warrantless Aerial Surveillance Endorsed*-- California v. Ciraolo, 9 Campbell L. Rev. 497 (1987); Note, *Eyes in the Sky, The Fourth Amendment in the Age of Aerial Surveillance*, 52 Mo. L. Rev. 507 (1987); Note, *Fourth Amendment -- The Constitutionality of Warrantless Aerial Surveillance* -- California v. Ciraolo, 106 C. Ct. 1809 (1986), 77 Sup. Ct. Rev. 602
(continued...)

Florida submits this Court should now seize the opportunity afforded by this case to furnish the criteria by articulating suitably neutral Fourth Amendment principles governing police aerial observations in the light of reasonable expectations of privacy.

I. WARRANTLESS NAKED-EYE AERIAL OBSERVATION IS PERMISSIBLE WHENEVER THE POLICE OBSERVER IS WHERE HE HAS A RIGHT TO BE.

A. Ciraolo Establishes The Rule That Warrantless Naked-Eye Aerial Observation From A Lawful, Public Vantage Point Is Contitutionally Permissible.

Ciraolo set the rule which governs this case, that an aerial observation by unaided vision violates no reasonable expectation of privacy:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 S.Ct. 507, 516, 19 L.Ed.2 576 (1967) (Harlan, J., concurring). Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed. 2d 220 (1979).
>
> . . . .
>
> We turn, therefore, to the second inquiry under Katz, i.e., whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."
>
> . . . .
>
> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require

---

[9] (...continued) (1986); Note, In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment? -- California v. Ciraolo, 40 Sw. L. J. 1133 (1986).

> law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. . . . "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, supra, 389 U.S., at 351, 88 S.Ct., at 511.
>
> . . . . That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.

Ciraolo, 476 U.S. 211-14, 106 S.Ct. at 1811-13, 90 L.Ed.2d at 215-17 (some case citations omitted).

The Florida Supreme Court acknowledged that, unlike fixed-wing aircraft which must fly in "navigable airspace," "'[t]he

lawfully operated helicopter need stand back only such distance as not to hazard persons or property.'" J. A. 133, quoting Sabo, supra. That determination, had Ciraolo been accurately followed, would have compelled the opposite answer to the Fourth Amendment question than that which the Florida Supreme Court reached.

B. There Was Not And Could Not Be Any Reasonable Expectation Of Privacy From Naked-Eye Aerial Observation From A Lawful, Public Vantage Point.

There was only the barest evidence that Riley showed even a subjective expectation of privacy, the first prong of the Katz test. The incidents of privacy were (i) Riley's mobile home and greenhouse were within an over-five acre tract, (ii) a net wire fence extended around or partly around the perimeter of the tract, (iii) a "DO NOT ENTER" sign was posted, (iv) two of the sides of the greenhouse were closed, shrubbery partially covered a third, and the view of the fourth was obscured by the mobile home, and (v) most of the roof was covered. The first three items are merely physical facts or show an intent to exclude trespassers, not viewers. The last two are contradicted by the fact two sides of the greenhouse were not covered and were exposed to view (J.A. 32, 39), and there was enough uncovered space in the roof, as well as the two open-air sides, that one could see in with unaided aerial vision. J.A. 29, 31-32, 42.

If those facts suffice to show a subjective expectation of privacy from aerial observation, then this Court might as well say that prong is self-proving by bare bones allegations. See J.A. 9, ¶ 9. In fact, this Court has expressed healthy skepticism of claims of subjective

expectation on facts far more likely to corroborate such claims.[10]

But assuming the existence of subjective expectation, Riley could have had no reasonable objective expectation of privacy from warrantless naked-eye aerial observation, the second prong of the Katz test. Riley could not reasonably assume an observer from an aerial vantage point could not see in through the roof he built and which he did not fully cover, and through the two sides he chose not to close, so as to identify the 6-12 foot plants for what they were.

---

[10] E.g., Ciraolo, supra, 476 U.S. at 211-12, 106 S.Ct. at 1812, 90 L.Ed.2d at 216 ("Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances.") (emphasis in original).

officers stated they could observe marijuana growing through the openings in the roof of the greenhouse, a search warrant was secured.

7. There was no probable cause for issuance of said search warrant.

8. It was impossible for the officers of the Pasco County Sheriff's Department to have a reasonable belief that marijuana was growing at the defendant's residence.

9. The above procedures used by the Pasco County Sheriff's Department in attempting to collect information concerning the possession of marijuana by the defendant intruded upon an area in which the defendant had a reasonable expectation of privacy and the defendant's constitutional rights.

10. Any marijuana seized from the defendant's residence was seized illegally and in violation of the defendant's rights

under the United States Constitution and the Laws of the State of Florida.

WHEREFORE, the defendant moves this Honorable Court for an Order suppressing any and all marijuana seized from the defendant or from the defendant's residence.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, 7530 Little Road, New Port Richey, FL by personal service, this 6th day of December, 1984.

/s/ Marc Salton
MARC H. SALTON
4911 C.R. 54
New Port Richey, FL 33552
(813) 842-2412

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR
PASCO COUNTY, FLORIDA

STATE OF FLORIDA) Case No. 84-1606CFAWS
)
vs.)
)
MICHAEL RILEY)
)

O R D E R

THIS MATTER coming on to be heard on the 14th day of December, 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.

The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400

feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla.

2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Copies forwarded to:

Marc Salton, Esq.

Office of the State Attorney

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. RILEY,)
)
Petitioner,)
)
v.) Case No. 67,906
)
STATE OF FLORIDA,)
)
Respondent.)
)

MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure, 9.330, Respondent moves for a rehearing of this Court's opinion of July 9th, 1987, on the grounds that this Court overlooked or misapprehended the following:

I.

Michael A. Riley did not exhibit a subjective expectation of privacy from aerial viewing.

And, the officers in the instant case were in a place where they had a right to be when they spotted the contraband and accordingly, the viewing did not constitute a search within the context of the fourth amendment.

II.

As a basis for this Court's decision in Riley, the Court stated:

> Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earth-bound and aerial observation. The fact that a few panels of the roof were missing does not alter our conclusion.
> Riley, page 7. (emphasis supplied)

The State does not agree that Riley exhibited a subjective expectation of privacy.

In California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. ___ (1986),

the United States Supreme Court took care to note that it was not addressing the issue of whether Ciraolo had manifested a subjective expectation of privacy from all observations of his backyard, or whether he instead manifested merely a hope that no one would observe his unlawful gardening pursuits. Id. at 90 L.Ed.2d 216.

Petitioner's greenhouse was located in a rural area. The photographs included in the record on appeal show that approximately 1/8th of the roof was uncovered and of the remaining portion the contraband could be readily viewed through 1/2 of one side of the roof. The remaining roofing was made of white fiberglass covering which allowed light to enter the structure. Further, the building was enclosed only on two sides. One of the remaining sides was open to an area of trees and shrubbery and the fourth side was screened by a mobile home. The marijuana was clearly visible through the roof and the sides.

Here, as in Ciraolo, the petitioner's actions manifested no more than a hope that no one would observe his unlawful gardening pursuits.

III.

In Riley, this Court concedes that the officers were in a place they had a right to be. Nevertheless, the Riley decision suggests that this is not determinative under Katz v. United States 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

> "Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point."
>
> Id. at page 6.

First, Katz rested on a determination that the technology used allowed the officers to intercept a private conversation.

> "The critical facts in this case is that '[o]ne who occupies it, [a] telephone booth shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 582. The point is not that the booth is 'accessible to the public' at other times, ante, at 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.
>
> Katz, at 361.

Nothing in the Katz opinion suggests that Katz' fourth amendment rights would have been violated had the officers simply overheard the conversation while standing outside the phone booth. In other words, had the officers been in a place where they had a right to be, rather than intruding into the occupant's expectation of privacy, there would not have been a search within the context of the fourth amendment.

This Court, nevertheless, holds that even though the officers were in a place they had a right to be, the overflight was a violation of petitioner's reasonable expectation of privacy. Riley concludes that the officers were not in public navigable airspace because the helicopter was below the 500 foot minimum for fixed-wing aircraft in a non-congested area. Accordingly, the opinion urges that although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents would not be

examined from a helicopter hovering below 500 feet.

This conclusion is contrary to the Supreme Court's decision in Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986). The officers here and the officers in Dow were in a place they had a right to be. The camera used by the agents in Dow allowed them to observe the Dow Chemical Plant at a closer point than a mere 1,000 feet. The maneuverability of the helicopter also allowed the officers in the instant case to observe Riley's greenhouse from a closer point that [sic] 1,000 feet.

Nevertheless, this Court in Riley attempts to distinguish the two based on the intrusive nature of the helicopter itself.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

Further, as the Court noted in Katz:

> "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can

> be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home."

Katz, 389 U.S. 350. fn.4, citing Griswold v. Connecticut, 381 U.S. 479 (dissenting opinion of Mr. Justice Black).

Thus, while the camera used in Dow may have been more surreptitious than the presence of a helicopter, this is a distinction without difference.

Further, from a technological standpoint, the concept of a helicopter was developed by Leonardo DiVinci in the 15th century and helicopters have been in use since the first quarter of this century. The use of helicopters is not a futuristic technological advance such as concerned the court in Katz.

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites omitted) were plainly not aimed at simple

> visual observations from a public place."
>
> * * *
>
> "One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Beyond the fact that there is little support for this Court's conclusion that for an aerial viewing to be proper it must be from above minimum altitude levels for fixed-wing aircraft, there is also little support for this Court's conclusion that the helicopter in the instant case was not in public navigable airspace. See, 14 C.F.R §91.79(d), 49 U.S.C.A. §1301(26), and Griggs v. Allegheny County, 369 U.S. 84, 7 L.Ed.2d 585, 82 S.Ct. 531, rehr'g denied, 369 U.S. 857, 8 L.Ed.2d 16, 82 S.Ct. 931 (1962); see also, California v. Sabo, 95 L.Ed.2d 855 (1987) (White, B., dissenting) (Court of Appeals holding that

helicopter was not in navigable airspace at 400 feet is questionable.). In either case, the fact remains that the officers in the instant case were in a place that they had a right to be and could plainly spot the contraband without the aid of a 'futuristic technological development'.

This Court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to the Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, the Court in Ciraolo also made it clear that a focused surveillance does not violate fourth amendment rights against search and seizure.

It is clear that any helicopter pilot or passenger properly flying in this airspace could have seen everything that these officers observed. Based on similar facts, the Court in Ciraolo readily concluded that respondent's expectation that his garden was protected from such observation was unreasonable and was not an expectation that society was prepared to honor.

Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company

repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217. Accordingly, this Court has overlooked and misapprehended the fact that petitioner did not exhibit a subjective expectation of privacy that no one would observe his unlawful gardening pursuits, and that because the officers were in a place they had a right to be when they spotted the contraband, the overflight did not constitute a search within the context of the fourth amendment.

WHEREFORE, based on the foregoing reasons and citations of authority, respondent respectfully prays this Honorable Court to grant the instant Motion for Rehearing and reverse its decision.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Marc H. Salton, Esquire, 4911 C.R. 54, New Port Richey, Florida 33552, this _______ day of July, 1987.

/s/
OF COUNSEL FOR RESPONDENT

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

8

No. 87-764

In The
Supreme Court of the United States
October Term, 1987

STATE OF FLORIDA,
Petitioner,
v.
MICHAEL A. RILEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Respondent, MICHAEL A. RILEY, respectfully requests that this Court deny the State of Florida's petition for a writ of certiorari seeking review of the published opinion of the Supreme Court of the State of Florida, submits the following as his Brief in Opposition.

STATEMENT OF THE CASE

In August of 1984 Respondent, MICHAEL A. RILEY, was charged with the unlawful possession and manufacture of marijuana. Respondent lived in a residential mobile home, which had a greenhouse-type structure located ten (10) to twenty (20) feet from the mobile home. Contained within the greenhouse was the marijuana which is the subject of this case. The greenhouse was enclosed on two sides while the remaining sides were obscured by both trees, shrubbery and the mobile home. The mobile home and greenhouse were enclosed by a wire fence and had a "do not enter" sign posted. The contents of the greenhouse were obscured from all ground views outside the fenced property due to the sides of the greenhouse, the mobile home and the shrubbery. The greenhouse also had a roof in which two panels were missing, exposing approximately one-tenth of the roof area.

Deputy Gell of the Pasco County Sheriff's Department, acting upon an anonymous tip that marijuana was growing on the Respondent's property, went to that location. Deputy Gell was unable to determine from outside Respondent's property what was growing in the greenhouse. Deputy Gell then secured a helicopter which flew over Respondent's residence. The helicopter flew over the greenhouse and residence of Respondent at approximately 400 feet and circled the greenhouse and residence twice. Deputy Gell also took photographs of the greenhouse from the helicopter.

Through the openings in the roof and through the open side of the greenhouse, Deputy Gell observed what he believed to be marijuana and then obtained a warrant to search the greenhouse, resulting in the seizure of marijuana plants from the greenhouse.

Michael A. Riley was charged by information on August 16, 1984 with two counts of violating § 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). Respondent filed a motion to suppress evidence on December 19, 1984. After a hearing on the motion, the trial court issued its Order suppressing the evidence.

The State took an appeal to the Second District Court of Appeals for Florida. Florida's Second District Court of Appeals reversed the trial court's order in its opinion issued on October 16, 1985. The opinion also certified the case to the Florida Supreme Court as a question of great public importance.

The Florida Supreme Court reviewed the decision and reversed the District Court's opinion on July 9, 1987.

The State filed a motion for rehearing on July 11, 1987. This motion was denied on September 11, 1987.

In the opinion below, the Florida Supreme Court held that the surveillance of the interior of a partially covered greenhouse in a residential backyard from a vantage point of a helicopter located 400 feet above the greenhouse constituted a "search" for which a warrant is required under the Fourth Amendment and Article I, § 12 of the Florida Constitution. The Court found that Riley's legitimate expectation that the contents of his greenhouse would not be viewed from a helicopter hovering below 500 feet was reasonable.

The Court applied the two-pronged test of *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507

(1967), and held Respondent exhibited an actual subjective expectation of privacy and that his expectation was reasonable. The Court reached the conclusion based upon an examination of both *California v. Ciraolo*, 106 S.Ct. 1809 (1986) and *Dow Chemical Co. v. United States*, 106 S.Ct. 1819 (1986) and determined that the details observed from a helicopter hovering at 400 feet could not have been discovered by any person casually flying over the area in a fixed wing aircraft. The Court also noted that a helicopter hovering at 400 feet so its occupants could look through an opening in a roof is much more physically intrusive than a fixed wing aircraft flying at 1,000 feet.

The State filed their Petition for Writ of Certiorari contending the decision of the Florida Supreme Court conflicts with this Court's decision in *California v. Ciraolo* (supra).

REASONS FOR DENYING THE WRIT

Petitioner, the State of Florida, contends this court should grant a writ of certiorari in this matter because the decision of the Florida Supreme Court, *Riley v. State*, 511 So.2d 282 (Fla. 1987), conflicts with this court's decision in *California v. Ciraolo*, 476 U.S. —, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986).

The decision of the Florida Supreme Court in the case subjudice is consistent with *Ciraolo* and the prevailing legal principles interpreting the right to privacy as applied to the Fourth Amendment of the United States Constitution. This court recently denied the petition for writ of certiorari by the State of California in *People v. Sabo*, 185 Cal.App. 3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), *Cert. Denied* 107 S.Ct. 2200 (1987). *Sabo* is a case in which the facts and legal arguments advanced by the State of California are identical to those in the case subjudice. The State of California contended that the decision of the California Appellate Court invalidating an aerial search of the interior of a backyard greenhouse from the vantage point of a helicopter at an altitude of approximately 400 feet conflicted with this court's decision in *Ciraolo*. Inherent in the denial of the petition for writ of certiorari, was a rejection of the argument advanced by the State of California.

Ciraolo did not give a blanket approval to all aerial searches regardless of the height or manner in which they are made. The Florida Supreme Court, in this matter, noted the significant factual differences between this case and *California v. Ciraolo* and correctly applied the two-pronged test of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967). The Florida Supreme Court determined Respondent had demonstrated an actual subjective expectation of privacy that the interior of his greenhouse would not be subject to surveillance from a helicopter hovering at approximately 400 feet in a manner which enabled its occupants to peer through openings in the greenhouse's roof or sides, and that Respondent's expectation was reasonable. Furthermore, the helicopter was operating at less than the minimum altitudes of 1,000 feet in congested areas and 500 feet in non-congested areas designated as navigable airspace, United States Code section 1301 (29) and 14 Code of Federal Regulations section 91.79. The Florida court properly determined that the observations made by the law enforcement officers in this case constituted a search under the Fourth Amendment to the Federal Constitution and Article I, Section 12, of the Florida Constitution, for which a warrant was required.

Rather than merely disagreeing with this court's decision in *Ciraolo,* the Florida Supreme Court applied the rationale of both *Ciraolo, Katz* and other Federal and State court decisions to a factual situation markedly different than that which existed in *Ciraolo.* This court should, therefore, deny the writ of certiorari.

ARGUMENT

I.

RESPONDENT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE GREENHOUSE LOCATED WITHIN THE CURTILAGE OF HIS HOME.

This court's opinion in *California v. Ciraolo,* 476 U.S. —, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986), reaffirmed the standard set forth in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967). *Katz* established a two-pronged test for determining whether the government has intruded upon an individual's reasonable expectation of privacy and posed the following inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search; second, is society willing to recognize that expectation as reasonable. In *Ciraolo* this court determined the Respondent did not have a reasonable expectation of privacy that the marijuana growing in his backyard would not be observed from the vantage point of a fixed wing airplane at an altitude of 1,000 feet. This court stated:

> "The observations by officers Shutz and Rodriquez in this case took place within public navigable airspace, see 49 USC App. Section 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernable to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that Respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."
>
> (106 S.Ct. at p. 1812)

The factual differences between *Ciraolo* and the case subjudice are significant. Here the marijuana was located within a greenhouse whose interior was hidden from observation by the sides of the greenhouse, shrubbery, Respondent's residence and a roof. Only by circling the greenhouse at an altitude of approximately 400 feet and peering through two missing panels in the roof or looking through an opening in the side between the shrubbery and the roof could the contents within the greenhouse be observed. *Ciraolo,* on the other hand, merely had a fenced back yard in which the marijuana was completely open to the skies and easily visible to an officer in a fixed wing aircraft flying at 1,000 feet.

Petitioner's allegation that any helicopter pilot or passenger lawfully flying over Respondent's house could have seen everything the officers observed is not supported by the record and, in fact, the record on appeal, including the photographs, would negate that assumption. The Florida Supreme Court, in this matter, specifically noted:

> "We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed wing aircraft."
>
> (511 So.2d at p. 288)

These factual differences completely remove the case subjudice from the situation in *Ciraolo.*

Nor is this court's decision in *Dow Chemical Company v. United States,* 106 S.Ct. 1819 (1986) applicable to the case subjudice. In *Dow* government agents took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000 and 1,200 feet. This Court noted that the open areas of an industrial plant are not analogous to the curtilage of a dwelling but are more comparable to an open field.

The curtilage has consistently been given greater Fourth Amendment protection than open fields. *Hester v. United States,* 265 U.S. 57 (1924), *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735 (1984), *United States v. Dunn,* 107 S.Ct. 1134 (1987). Courts have further recognized that the curtilage extends to residential backyards and out buildings located close to the residence. *Taylor v. United States,* 286 U.S. 1 (1932), *United States v. Williams,* 581 Fed. 2d 451 (5th Circuit) (1978), *Cert. Denied,* 440 U.S. 972 (1979), *Huffer v. State,* 344 So.2d 1332 (Fla. 2d DCA 1977) (which involved a greenhouse located 20 feet from the residence).

Respondent clearly attempted to shield the contents of his greenhouse from both ground and air observations. The interior of the greenhouse was completely obscured from ground observation and the roof did not allow casual observation from the air. It is not necessary that Respondent have been completely successful in concealing the contents of his greenhouse from observation in order to receive Fourth Amendment protection, *United States v. Broadhurst,* 612 F. Supp. 777 (DC CAL 1985), nor does the fact that technology exists which enables the police to view its contents from a separate vantage point result in the loss of Fourth Amendment protection, *Wheeler v. State,* 659 S.W.2d 381 (Tex. Crim. App. 1982). As the Florida Supreme Court stated in *Riley* subjudice:

> "As we already have noted, *Katz* warned of the dangers created by technological advances by which police can conduct surveillance."
>
> (511 So.2d at p. 287)

Other courts have found helicopter surveillance violative of Fourth Amendment rights. *Blalock v. State,* 476 N.E.2d 901 (Ind. App. 1 Dist. 1985) held the aerial surveillance of a greenhouse violated Blalock's reasonable expectation of privacy. The court stated:

> "We conclude that aerial surveillance violated Blalock's Fourth Amendment rights. It could not, therefore, form the basis for the subsequent issuance of a search warrant."
>
> (476 N.E.2d at p. 904)

United States v. Broadhurst, 612 F. Supp. 777 (DC CAL 1985), likewise held an aerial search of a greenhouse impermissible. The court stated:

> "In short the court is aware of no decisions which would extend the practice of overflight by investigative officers to searches of the interior of residences and other structures. Furthermore, such an extension would, in this court's view, pose extremely dangerous consequences for the future protection of precious Fourth Amendment rights."
>
> (612 F. Supp. at p. 794)

The court, in *Broadhurst* further rejected the argument that police observed the contraband from a place they had a right to be, noting a difference between an individual who, though in a protected area, takes no precautions to shield his activities from public view as opposed to an individual who attempts to shield those activities from view.

Of particular importance is *People v. Sabo* (supra), a case identical in all material respects to the case subjudice. In *Sabo,* the California Court of Appeals held the observation of marijuana growing within a backyard greenhouse from the vantage point of a helicopter hovering at 400 to 500 feet, allowing its occupants to look through several missing roof and side panels constituted an unreasonable invasion of the Respondent's expectation of privacy and the seizure of the marijuana, pursuant to the issuance of a warrant based upon the helicopter viewing, violated Respondent's Fourth Amendment rights. The court, in *Sabo,* specifically took into consideration this court's opinion in *Ciraolo* and as did the Florida Supreme

Court in the case subjudice noted the important factual differences between the occupants of a fixed wing aircraft, flying in navigable airspace at 1,000 feet, observing marijuana in an open backyard and the occupants of a helicopter hovering at 400 to 500 feet peering through the holes in the roof of a greenhouse located in a residential backyard. The court, in *Sabo,* stated:

> "While the naked eye observation of marijuana growing in an open backyard from Ciraolo's fixed wing aircraft flying at 1,000 feet on a straight and narrow course in navigable airspace does not violate a reasonable expectation of privacy. Respondents assert a helicopter hovering at 400 feet, positioned to peer through gaps in a roof, intrusively invades and impermissibly violates a reasonable expectation of privacy."
>
> (230 CAL Rptr. at p. 173)

The court, in *Sabo,* also distinguished between the reality of helicopter surveillance as opposed to surveillance from fixed wing airplanes in navigable airspace The court stated:

> "To say any sighting from a helicopter in non-navigable airspace validates a search warrant, sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as an interminable hovering, a persistent overfly, a tree-top observation, all accomplished by the thrashing of the rotor, the clouds of dust, and ear-splitting din. Views from navigable airspace are far removed from the situs observed."
>
> (230 CAL Rptr. at p. 175)

Petitioner's reliance on this court's decision in *United States v. Knotts,* 460 U.S. 276, 75 L.Ed.2d 55, 103 S.Ct.

1081 (1983) is misplaced. This court based its decision upon the fact that the monitoring of Knotts occurred while he was in his automobile and travelling on public thoroughfares. The court also reiterated Knott's expectation of privacy within his dwelling:

> "Respondent, Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin is concerned . . .
>
> But no such expectation of privacy extended to the visual observations of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields'." (citations omitted)
>
> (103 S.Ct. at p. 1085)

Likewise, Petitioner's reliance on *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296 (1984), is faulty. In *Karo,* the court specifically stated that the use of a beeper to monitor activities within a residence violates the Fourth Amendment rights of those with a privacy interest in the residence. Neither *Knotts* nor *Karo* can justify the aerial surveillance of a greenhouse located within the curtilage of a residence, when there has been an actual subjective manifestation of privacy from both ground and aerial surveillance. To argue that surveillance of a protected area is justified as long as that surveillance occurs from outside the protected area; is contrary to established Fourth Amendment principles. The central point of *Katz* is that individuals do not lose Fourth Amendment protection merely because technology exists which enables the police to make observations from vantage points outside the protected areas.

The State of Florida advances the same arguments as did the State of California in their unsuccessful petition for writ for certiorari in *Sabo.* The difference between the significant intrusion upon privacy rights which occurred in the case subjudice and the minimal intrusion which occurred in *Ciraola* are such that would mandate a denial of the State of Florida's petition for writ of certiorari.

II.

THE CONCEPT OF NAVIGABLE AIRSPACE DOES NOT OPERATE TO VALIDATE HELICOPTER SURVEILLANCE OF RESIDENTIAL AREAS FROM ALTITUDES LESS THAN FIVE HUNDRED (500) FEET.

Petitioner argues the helicopter in the case subjudice was operating in navigable airspace and thus the surveillance of Respondent's greenhouse was permissable within the purview of the Fourth Amendment. The crux of this argument is Petitioner's contention that "lawful flight" and "navigable airspace" are synonymous. This argument was rejected by both the Florida Supreme Court in this case and the California Supreme Court in *People v. Sabo,* (supra). The California court stated:

> "While helicopters may be operated at less than minimum altitudes so long as no hazard results, it does not follow that such operation is conducted within navigable airspace.[3] The plain meaning of the statute

> defining navigable airspace as that airspace above specified altitudes compels the conclusion helicopters operated below the minimum are not in navigable airspace".
>
> (230 CAL Rptr. at p. 174-175)

Navigable airspace is defined in 49 United States Code section 1301 (29) as follows:

> "(29) 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft".

In 14 Code of Federal Regulations, these minimum altitudes are specified as follows:

> "§ 91.79 Minimum safe altitude; general.
>
> "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> "(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons, or property on the surface.
>
> "(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> "(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

The regulations then specify that helicopters may be lawfully operated at less than the specified minimum altitudes. Section (d)–reads as follows:

> "(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Thus, helicopters may be operated at an altitude less than the specific minimums designated as navigable airspace, i.e. 1,000 or 500 feet, as long as such operation can be conducted safely. A helicopter, in certain situations, may be safely operated at 100 feet, but one could hardly argue that navigable airspace encompasses altitudes that low. The legislative notes to 14 Code of Federal Regulations section 60.17(b) 1949, which is the predecessor to the current 14 Code of Federal Regulations section 91.79(d), are significant. This regulation permitted helicopter flight below 1,000 feet. The notes to subsection (b) stated:

> "The rule recognizes the special flight characteristics of the helicopter which can accomplish an emergency landing within a relatively small space. However, if a helicopter is flown over a congested area . . . at less than 1,000 feet above the highest obstacle, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety, and further, to maintain an altitude along the flight path thus selected from which such an emergency landing can be affected at any time."

Respondent would contend that the legislative definition of navigable airspace is a 1,000 minimum above congested areas and 500 feet over noncongested areas. Helicopters operated below navigable airspace may be done so lawfully but the legislative notes indicate, the pilot is required to fly with due regard to places in which an emergency landing can be made with safety and to maintain an altitude ***along the flight path*** from which an emergency landing may be accomplished at any time. Circling or hovering a helicopter over a residential home or in a residential neighborhood in order to peer through the holes in the roof of a backyard greenhouse does not appear consistent with a due regard for an emergency landing and surely is not consistent with a flight path conducive to an emergency landing at any time. Nor does it appear consistent with subsection (a) of 14 Code of Federal Regulations § 91.79 which requires an altitude allowing an emergency landing without danger to persons or property in case of a power failure. The actions of the law enforcement officers by circling and hovering the helicopter over Respondent's home and backyard at an altitude of 400 feet clearly were not operating within navigable airspace and arguably were not operating the helicopter lawfully.

The courts in both *Sabo* and the case subjudice noted the extraordinarily instrusive nature of helicopter surveillance. The Florida Supreme Court in ***Riley*** stated:

> "Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities".
>
> (511 So.2d at p. 288)

Other courts have also recognized the serious risk to privacy which may result from helicopter surveillance. In *N.O.R.M.L. v. Mullen*, 608 F.Supp. 945 (N.D. CAL 1985), the court stated:

> "It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into the privacies of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties".
>
> (608 F.Supp. at p. 957)

To hold as permissible, a warrantless aerial search of a residential area in which an individual has manifested an expectation of privacy, by a helicopter at an altitude of 400 feet, on the basis that the surveillance occurred from outside the protected area, would constitute a dangerous eroding of the Fourth Amendment protection from unreasonable search and seizures. The question of the type of surveillance and intrusion which are permissible would become both difficult and confusing. Would a helicopter hovering at 100 feet be unacceptable? Would a helicopter hovering in such a manner as to peer through an upper story window of a residence be unacceptable? Would the use of sophisticated equipment enhancing the ability to hear and see inside residences be unacceptable? Once the focus of the courts depart from the actual and reasonable expectation of privacy, the rights of the citizenary depart with it. Respondent would argue that society is not willing to hold as unreasonable, the privacy rights of individuals in their homes, structures and backyards to be free from government surveillance by hovering and circling helicopters at altitudes of less than 500 feet.

The decision of the Florida Supreme Court in the case subjudice, holding that Respondent had a reasonable expectation that the interior of his greenhouse would not be subjected to aerial surveillance by a helicopter hovering at an altitude of 400 feet and that such surveillance constituted a search within the purview of the Fourth Amendment for which a warrant was required, is not in conflict with this court's decision in *California v. Ciraolo*. Therefore, this court should deny the petition for writ of certiorari.

CONCLUSION

Based upon the authorities, statutes, regulations and argument cited herein, this court should deny the Petitioner's request for writ of certiorari.

Respectively submitted,

Marc H. Salton, Esq.
7714 Massachusetts Avenue
New Port Richey, FL 34653
(813) 842-2412

Counsel for Respondent

Supreme Court, U.S.
FILED
APR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

PARKER D. THOMSON Counsel of Record Cloyce L. Mangas, Jr. Special Assistant Attorneys General 4900 Southeast Financial Center 200 S. Biscayne Blvd. Miami, FL 33131-2363 (305) 350-7200	MARC H. SALTON Counsel of Record 7714 Massachusetts Avenue New Port Richey, Florida 34653 (813) 842-2412 Counsel for Respondent
Robert A. Butterworth Attorney General The Capitol Tallahassee, FL 32301 Counsel for Petitioner	

Petition for Certiorari filed November 9, 1987
Certiorari granted February 22, 1988

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Date	Item
August 29, 1984	Information for Violation of Florida Comprehensive Drug Abuse and Control Act filed, No. 8401606CFAWS (Fla. 6th Cir. Ct.) (R. 1-2).
December 6, 1984	Motion to Suppress served (motion filed December 20, 1984) (R. 5-6).
December 14, 1984	Exhibits filed in evidence (6 photographs) (R. 3-4).
December 14, 1984	Proceedings on Motion to Suppress. (Transcript filed January 22, 1985) (R. 17-68).
December 19, 1984	Order granting Motion to Suppress entered (R. 9-11).
December 21, 1984	State's Notice of Appeal filed (R. 12).
October 16, 1985	Opinion of the District Court of Appeal of Florida, Second District filed (reversing trial court's decision and certifying question to Supreme Court of Florida).

November 13, 1985	Michael Riley's Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court.
July 9, 1987	Opinion of the Supreme Court of Florida filed (quashing decision of the District Court and remanding for reinstatement of the trial court's suppression order).
July 24, 1987	State's Motion for Rehearing.
September 11, 1987	Order of the Supreme Court of Florida denying State's Motion for Rehearing.

FELONY INFORMATION

The Statute Number of the most serious crime contained herein is 893.13

8/22/84/
WED67

In the Circuit Court for the Sixth
Judicial Circuit of Florida,
in and for Pasco County

SPRING TERM, in the year of our Lord one thousand nine hundred eighty-four

8401606CFAWS SPN46467)
) INFORMATION FOR
STATE OF FLORIDA) VIOLATION OF
) FLORIDA
vs.) COMPREHENSIVE
) DRUG ABUSE AND
MICHAEL RILEY) CONTROL ACT
(2 cts.)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, in and for Pasco County, prosecuting for the State of Florida, in the said County, under oath, information makes that

MICHAEL RILEY

of the County of Pasco and State of Florida, on the 16th day of August in the year of our Lord, one thousand nine hundred eighty-four in the County and State aforesaid did unlawfully manufacture a certain controlled substance, to-wit: cannabis, commonly known as marijuana; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.

COUNT TWO

And the State Attorney aforesaid, under oath as aforesaid, further information makes that MICHAEL RILEY, of the County of Pasco, State of Florida, on the 16th day of August, in the year of our Lord, one thousand nine hundred eighty-four, in the County and State aforesaid, did unlawfully possess and have in his control a certain controlled substance, to-wit: cannabis, commonly known

as marijuana, which contained more than 20 grams of cannabis; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA)
)
PASCO COUNTY)

Personally appeared before me JAMES T. RUSSELL, the undersigned State Attorney for the Sixth Judicial Circuit of Florida, in and for Pasco County, or his duly designated Assistant State Attorney, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense charged; hence this information is filed in good faith in instituting this prosecution, and that testimony was received under oath from a material witness or witnesses.

/s/
Designated Assistant
State Attorney for the Sixth
Judicial Circuit of the State
of Florida, prosecuting for
said State

SWORN TO AND SUBSCRIBED before me this 28th day of August A.D. 1988.

(SEAL)

/s/
Notary Public

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL
CIRCUIT OF THE STATE
OF FLORIDA, IN AND FOR
PASCO COUNTY

8401606CFAWS

STATE OF FLORIDA)

vs.)

MICHAEL A. RILEY)

MOTION TO SUPPRESS

COMES NOW the Defendant, MICHAEL A. RILEY, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure and hereby moves this Honorable Court for an Order suppressing all quantities of marijuana seized from the defendant or his residence on August 16, 1984 and as grounds therefor would allege:

1. That on August 16, 1984 officers of the Pasco County Sheriff's Department

secured a search warrant for the residence of the defendant.

2. Pursuant to the execution of the search warrant several quantities of marijuana were seized from the defendant's residence and property.

3. Prior to securing said search warrant, Deputy Robert Longworth, Pasco County Sheriff's Department, received information that marijuana was growing on the defendant's property.

4. Deputy Robert Longworth attempted to view marijuana from the roadway surrounding the defendant's property but could only see a greenhouse behind the defendant's trailer and could not tell what was growing within said greehouse [sic].

5. Officers of the Pasco County Sheriff's Department then flew a helicopter and hovering over the defendant's greenhouse, then attempted to view what was growing in said greenhouse through openings in the roof of said greenhouse.

6. Based on testimony that the officers stated they could observe marijuana growing through the openings in the roof of the greenhouse, a search warrant was secured.

7. There was no probable cause for issuance of said search warrant.

8. It was impossible for the officers of the Pasco County Sheriff's Department to have a reasonable belief that marijuana was growing at the defendant's residence.

9. The above procedures used by the Pasco County Sheriff's Department in attempting to collect information concerning the possession of marijuana by the defendant intruded upon an area in which the defendant had a reasonable expectation of privacy and the defendant's constitutional rights.

10. Any marijuana seized from the defendant's residence was seized illegally and in violation of the defendant's rights under the United States Constitution and the Laws of the State of Florida.

WHEREFORE, the defendant moves this Honorable Court for an Order suppressing any and all marijuana seized from the defendant or from the defendant's residence.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, 7530 Little Road, New Port Richey, Florida, by personal service, this 6th day of December, 1984.

/s/ Marc Salton
MARC H. SALTON
4911 C.R. 54
New Port Richey, FL 33552
(813) 842-2412

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR PASCO COUNTY

STATE OF FLORIDA :
Plaintiff, :
vs. : CASE NO. 840160CFAWS
MICHAEL A. RILEY :
Defendant. :

PROCEEDINGS:	MOTION TO SUPPRESS
BEFORE:	Honorable W. Lowell Bray, Jr. Circuit Judge Sixth Judicial Circuit
DATE:	December 19 [semble, sic][14], 1984
PLACE:	Pasco County Government Center 7530 Little Road New Port Richey, Florida
REPORTED BY:	Mary A. Fortner Deputy Official Court Reporter Notary Public State of Florida at Large

APPEARANCES:

Ellen Condon, Esquire
Assistant State Attorney
New Port Richey, Florida
Appearing on behalf of
State of Florida

Marc Salton, Esquire
4911 C.R. 54
New Port Richey, Florida
Appearing on behalf of
Defendant

ALSO PRESENT:

Michael A. Riley,
Defendant

[*i]

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[*2]

PROCEEDINGS

THE COURT: State versus Michael A. Riley, 8401606, and this is a Motion to Suppress. Ready?

MR. SALTON: Not until Detective Longworth gets here, I'm not.

THE COURT: Okay. We'll wait a couple more minutes. Is there any chance of the State and the Defense agreeing on some, any, all or most of the facts? We agreed there was a helicopter out there?

MISS CONDON: Yeah, it depends on what.

THE COURT: Pick facts that you think is most important.

MR. SALTON: The only thing, as far as Detective Longworth is, he, apparently, received a tip that there was marijuana growing on my client's property. He went out to investigate that and attempted to see if he could observe any marijuana growing from the road next to my client's trailer in the back, but could not see what was growing inside the greenhouse.

Consequently, he went to Gell and they went with the helicopter.

MISS CONDON: Didn't he see plants, which he said were consistent with marijuana plants?

MR. SALTON: I thought he just said he saw plants and he couldn't tell what they were.

[*3]

MISS CONDON: I guess, we better get him here.

THE COURT: Is there going to be an argument that the tip alone is enough for the warrant? I think it wasn't even used.

MISS CONDON: That what, the tip?

THE COURT: The tip?

MISS CONDON: No. That was not even a part of --

MR. SALTON: No. That's not in issue.

THE COURT: Okay.

MR. SALTON: They say Longworth is on his way. We can start with Gell and take them in order, but, apparently, he's saying he's never gotten a subpoena. That's always a problem I wonder about, when you subpoena everybody for Friday and either the trial or something doesn't go later in the week. I know, I have never resubpoenaed people and I don't think the State does either. I just tell them --

MISS CONDON: We don't for trial subpoenas.

MR. SALTON: This was a subpoena for trial.

MISS CONDON: For a motion. I mean, I got notice of hearing for a Motion to Suppress at 9:00 A.M. on Monday morning. Is that what you subpoenaed him for?

MR. SALTON: I just subpoenaed him for court for 9:00, A.M. At that point in time, it was still on the calender, of course, so I made a representation at that

[*4]

time that it would be dispositive of the case.

MISS CONDON: Did you resubpoena them for today?

MR. SALTON: No.

MISS CONDON: That's probably what happened. You know, trial subpoenas usually stay good for the week.

MR. SALTON: That's what I told them on Monday, that this subpoena was good for a week.

MISS CONDON: But, it was for a motion. You weren't subpoenaing them for a trial?

MR. SALTON: Yes. I was.

MISS CONDON: In fact, you indicated this was going to trial.

MR. SALTON: But, when I issued the subpoena, I was subpoenaing them for trial, is what I was doing. Either way, we can start with Gell.

THE COURT: If you are ready to go, I'm ready to hear it.

MR. SALTON: I'm just going to have Officer Rossmeissl turn over some photographs to the clerk, so that they can be used during my questioning of Detective Gell.

THEREUPON,

KURT A. GELL

the witness therein, first being duly sworn, was examined

[*5]

and testified as follows:

DIRECT EXAMINATION

BY MR. SALTON:

Q State your name, please?

A Kurt A. Gell.

Q And your occupation?

A Deputy Sheriff, Pasco County Sheriff's office.

Q Did you get involved in the case, State of Florida versus Michael Riley?

A Yes. I did.

Q How did you get involved in that case?

A I received information from Deputy Longworth that there was a possible drug violation occurring out at Moon Lake.

Q And what did he tell you he had done in regards to that?

A He said he went and tried to locate the location where it was at and wanted me to go out there with him.

We went out and located the residence.

Q And did you locate the residence?

A Yes.

Q And what did the residence consist of?

A Acreage with a trailer and some buildings behind it.

Q And at the point in time that you located the

[*6]

residence, were you attempting to see if you could observe any marijuana growing in and about that residence?

A Yes. There were.

Q Where did you position yourself to attempt to observe any marijuana?

A Out on the road.

Q This would be the road that runs in front of the trailer?

A Yes. Correct.

Q It's correct that that property was fenced, was it not?

A Yes, sir.

Q And when you attempted to see if you observed any marijuana growing, could you observe any marijuana growing?

A We observed what looked to be a greenhouse at the back of the trailer. It appeared as though large plants were growing in that greenhouse.

Q You couldn't tell what kind of plants they were?

A Not from right there; no, sir.

Q Did you position yourself at different areas on the road to attempt to see?

A Yes, sir.

Q And at no area that you positioned yourself, you could see or identify what was growing in the greenhouse?

[*7]

A No.

Q Now, the greenhouse, was it directly behind the trailer?

A Yes, sir.

Q Within ten, twenty feet of the trailer?

A Yes, sir.

Q Now, there was some coverage on the side of the greenhouse, was there not?

A Correct.

Q What was that?

A It's like a ripple, plastic fiberglass-type material.

Q And was that material that was coverage to the house of the greenhouse, that blocked your view of seeing what was inside?

A Correct.

Q Could you see a roof on the greenhouse?

A From there; no, sir.

Q You don't know whether it was moved or not?

A Correct.

Q Other than along the different areas of the road, did you attempt to position yourself any place else to see if you

could see what was growing in the greenhouse?

A You mean the first time we went out there?

Q The first time?

[*3]

A No.

Q Apparently, there is woods on one side of the property?

A I believe so.

Q Okay. When you were unable to see the greenhouse from the road, what did you do -- or see what was inside the greenhouse from the road, what did you do?

A I contacted our helicopter pilot so we could fly over the area.

Q And did you get in the helicopter?

A Correct.

Q So, you yourself actually flew over the area?

A Correct.

Q And was anybody else in the helicopter besides you and the pilot?

A No.

Q What did you do in regards to flying over the property?

A The pilot was Mike Rock, and we flew over the area. I showed him where the house -- correction, where the trailer was located, and at that point, we circled over the top, could observe the greenhouse at the back of the trailer, part of the roof was missing from this greenhouse. The roof was a white rather than a green, I believe, and part of the roof was missing, and as we circled around from

[*9]

where we couldn't see from the road, one side of the greenhouse was wide opened.

Q The side that was wide opened was just opened field, was it not, or woods, isn't that correct, where the greenhouse was opened, that side was facing -- there was a wooded area?

A I believe so.

Q Did you ever attempt to go on the property next to Mr. Riley's house?

A No. I did not.

Q To see from any adjacent property, you could see what was in the greenhouse?

A No. I didn't.

Q So, you don't know if it was the greenhouse or the side of the greenhouse that did not have -- the portion of the greenhouse did not have a side on it, if that was visible from any adjacent property?

A I never went on somebody elses property.

Q So, you don't know?

A No.

Q How many acres -- do you recall how many acres are out there?

A As far as the defendant's acreage, I don't know how much acreage he has there.

Q Now, when you got over the property with the

[*10]

helicopter, what did you do?

A We circled the top, over the top of the residence, observed the greenhouse and saw that there was several plants, large, that were growing inside. We could observe at that time that there was marijuana growing inside.

Q Now, when you first flew over the house, did you have to drop the helicopter, the altitude of the helicopter?

A We were flying approximately four hundred feet.

Q Did you ever get lower than four hundred feet?

A I don't know. I wasn't paying attention to the height. I was keeping an eye on the trailer and the greenhouse.

Q I'm going to show you what's marked as the photograph that's marked as Exhibit H, and for the record here, we'll call it Defendant's Exhibit A for identification, and ask if you recognize that photograph?

A Yes, sir.

Q Did you take the photograph?

A Yes, sir.

Q Does that accurately depict what you saw on that date?

A Yes, sir.

Q Okay. Now, did you get any lower than that photograph?

A I was taking a couple pictures of it and I'm not

[*11]

really sure with the zoom lens on the camera, so the picture can't depict exactly what height we were in, because I could have taken another picture that could show it closer.

Q My question would be this: Can you see how close the house, the trailer and the greenhouse is to you from that photograph? Did you get any closer than that?

MISS CONDON: I have to object to that question. We don't know what height that photograph was taken from.

BY MR. SALTON:

Q I'm not referring to specific heights. What I'm referring to, did you ever get to a position where the greenhouse and the trailer were closer or bigger than is shown in that picture?

A I would say it was bigger, because I could see down inside and see the plants inside through the openings there is in the roof.

Q Were you using the zoom lens on the camera?

A It wasn't my camera.

Q Did you have the ability with the camera lens to bring in something larger?

A Correct.

Q Through the camera, were you able to see things larger than you were able to see with your naked eye?

A I would believe so.

[*12]

Q At any time, did you shoot the greenhouse from the air with the camera on the largest or the highest setting to make things the largest?

A I'm not really sure if I did or not. I took a couple pictures and we left.

Q You think you cruised over there at four hundred feet?

A Correct.

Q Okay. My question, then, would be: Once you got over the greenhouse, did you lower, did you come closer with the helicopter?

MISS CONDON: I object to that. It's been asked and answered.

MR. SALTON: I don't think he specifically answered that question.

THE COURT: I'll allow the question.

THE WITNESS: I'm not really sure. I was just observing the residence and the greenhouse. If we dropped a hundred feet, I have no idea.

BY MR. SALTON:

Q Well, you came over at a certain level, correct, and you were looking at the ground and the trailer at that level, am I correct?

A Well, when we came in, we were a lot higher than when we circled.

[*13]

Q But, when you were circling it, after you made a circle, did you ever drop to a lower level?

A Not that I know of.

Q Now, were you using a pair of binoculars?

A No.

Q Did you have a pair of binoculars with you?

A No.

Q On this picture, would you tell me through what area you were able to see the marijuana growing?

A What area?

Q Yeah; through the hole in the roof?

A Through the two holes in the roof and then when we were on this side, we could also see through the open side of the greenhouse.

Q How low did you have to get to see through the open side of the greenhouse?

A Same. Whatever we were at.

Q It would have been a lot lower than what this picture was taken?

A Not necessarily.

Q How many times did you circle the greenhouse?

A I believe twice.

Q Okay. Did you take all the photographs on that date?

A All of them?

[*14]

Q Yeah?

A No.

Q I'm going to show you what's marked as Number A, on the photograph, the Defendant's Exhibit Two For Identification purposes, and did you take that photograph?

A Yes.

Q Let me just let you peruse the composite and all the photographs that were put into evidence, in possession of Mr. Rossmeissl and ask you if any other of those photographs were taken by you from the air. I'm going to show you the rest of the photographs and ask you if there are any others there that you took from the air.

A No.

Q So, it would be fair to say that you took two photographs from the air?

A Yeah.

Q Now, photograph A, shows the trailer and the greenhouse a little larger; is that correct?

A I would say so.

Q Is that as large as you were ever able to see the trailer and the greenhouse?

A I could see the greenhouse a lot better than this camera saw it.

Q So, are you saying that, even with the zoom lens that would bring it in closer, you saw the trailer and

[*15]

the greenhouse better?

A Yeah.

Q Did you ever get closer to the trailer and the greenhouse depicted in that picture?

A As far as my sight was concerned, I felt that these pictures are not accurate, because, first of all, if they're at the same height, which is what I feel I was at, obviously, I took one with a little bit more powerful lens, I'm not experienced with the camera and a borrowed camera at that.

I just took the pictures so we would have them for whatever we would need for later on.

Q I'm going to show you what's marked as Exhibit Number G, and do you recognize that photograph?

A This photograph?

Q Yes?

A I believe it might have been taken by Detective Longworth?

Q Does that accurately reflect, though, the relationship of the trailer and the greenhouse?

A Yes, sir.

Q Let me show you what's marked as photograph Number B, and ask if that photograph accurately depicts the back area of the residence, as far as the shrubbery and the overgrown brush area?

A The brush and everything, as far as the trailer?

[*16]

of the trailer?

Q Yes?

A I would believe so.

Q I'm going to show you what's been marked as photograph Number P, and ask if that photograph accurately depicts the greenhouse as you observed it on that date?

A On that date?

Q Yes?

A Yes.

Q And would photograph Y,accurately reflect the holes in the roof?

A Those were the holes in the roof.

Q And photograph Z, would that accurately depict the area that the trailer was sitting in? I know it's a far away view of the trailer?

A This here was a picture of the load

that was being taken away from the defendant's house.

Q I'm referring to the trailer in the back?

A That's not the defendant's trailer.

Q Oh, it isn't?

A (Nodded negatively.)

MR. SALTON: That's all the questions I have, Judge.

[*17]

CROSS-EXAMINATION

BY MISS CONDON:

Q Detective Gell, how long have you been a police officer?

A Fourteen and a half years.

Q How long have you been with the Pasco County Sheriff's office?

A Seven and a half years.

Q And prior to that, what law enforcement experience did you have?

A St. Petersburg police officer for seven and a half years.

Q During your experience as a police officer, have you had occasion to observe marijuana plants?

Q Yes. I have.

Q On approximately how many occasions?

A Probably a hundred times.

Q In your experience, have you ever had an occasion to observe marijuana plants from the air?

A Yes. I have.

Q Either in a helicopter or an airplane?

A Yes. I have.

Q How many times?

A Approximately six.

Q You indicated that there was a plastic on a portion

[*18]

of the side or sides of this grown

side. On how many sides was there plastic?

A Two.

Q Does that mean that the other two sides were exposed to view?

A Yes. They were.

Q And, of course, you have indicated that a portion of the roof was not covered with anything; is that correct?

A That's correct.

Q You did not take all of these photographs; is that right?

A That's right.

Q Did you take any of the photographs on the ground?

A No, ma'am.

Q Who took the photographs on the ground?

A I believe Detective Longworth did.

Q Were you present when they were taken?

A I was in the vehicle, but I was not working the camera.

Q You were on the premises while the photographs were being taken?

A You are talking about the ones of the greenhouse?

Q Yes?

A Yes.

Q And you have had a chance to review all those

[*19]

photographs; is that right?

A Yes.

Q To the best of your knowledge, do they accurately depict the way the greenhouse and the residence and the surrounding premises appeared on the day that you served the search warrant.

A I didn't serve the search warrant. Detective Longworth did.

Q All right, but the day that the search warrant was executed on that property,

do those photographs accurately depict what they purport to show?

A Yes, ma'am.

Q When you were in the helicopter, did you get low enough or near enough to the ground in the surrounding premises, the property around the residence to observe what you believe to be, based upon your training and experience, marijuana plants?

A Yes. I did.

Q And what was it about these plants that made you believe that they were, in fact, marijuana plants?

A The coloration that is given off from them, as well as the way they were grown, and the leef [sic] configuration of the plants.

Q And you were able to see that from the helicopter?

A Correct.

[*20]

Q Did you take photographs of these plants and the premises surrounding the house from every angle at which you observed the plants from the helicopter?

A No. I did not.

Q So, would it be fair to say that you had visual observation of the residence, the greenhouse, and the surrounding premises, which are not depicted in these photographs?

A Correct.

MISS CONDON: I have nothing further, at this time.

THE COURT: Anything further?

MR. SALTON: Just one question?

REDIRECT EXAMINATION

BY MR. SALTON:

Q Detective Gell, using Exhibit A, the two sides that did not have covering,

two sides of the greenhouse that did not have covering would have been, at least, in regards to the photograph, if north is on top, would be the east and west sides, hypothetically?

A North would be the top of the photograph?

Q Yeah?

A The two sides that were open would be the east and south sides.

Q Are you saying this side here?

[*21]

A The right-hand side of the photograph and the bottom, between the greenhouse and the trailer were open.

Q So, on Photograph A, it would be the right-hand side of the greenhouse?

A Correct.

Q And is there a clump of shrubbery facing that open side or close to that open side?

A Approximately twenty-five, thirty feet or so.

Q So, you are not saying what's in that greenhouse would be viewable from any adjacent property?

A I didn't look from any adjacent property.

Q You don't know whether it would or it would not?

A Correct.

MR. SALTON: That's all the question, I have.

MISS CONDON: I've got nothing further at this time.

THE COURT: May he be released?

MR. SALTON: Would you mind waiting for a few moments?

THE COURT: You may call your next witness.

MR. SALTON: At this time, I would go ahead and enter Exhibit Photographs entitled H, A, Y, P, G, and B.

THE COURT: Any objections?

MISS CONDON: No objections to these. Judge, I would suggest that all the photographs be admitted, rather than just selectively picking out some. I think, in order for the Court to make an accurate determination, why don't we put them all in?

MR. SALTON: I don't have any problem with it, if you want to go ahead. Some of them aren't relevant to the Motion to Suppress, and I don't see -- I wouldn't put them in.

THE COURT: Take whatever you want and if the State wants to put them all in, we'll let you argue.

MISS CONDON: I would proffer them all, in going through one by one.

THE COURT: Madam Clerk, why don't you take the small piles and mark those and get those taken care of and those will be accepted into evidence.

MR. SALTON: Your Honor, I would call Michael Riley.

THE COURT: All right, sir. Take a seat down there, sir.

THEREUPON,

MICHAEL A. RILEY

the defendant here, being first duly sworn, was examined and testified as follows:

[*23]

DIRECT EXAMINATION

BY MR. SALTON:

Q Mr. Riley, just one question. I'm going to show you a photograph marked Exhibit H, were you residing at that residence?

A Yes.

Q In August of 1984?

A Yes.

Q Just one question. The left-hand portion of that greenhouse, was anything that would have been growing in that greenhouse, was that visible from any adjoining property?

A No.

MR. SALTON: I don't have any other questions of the witness.

THE COURT: Questions?

CROSS-EXAMINATION

BY MISS CONDON:

Q Who was living at the residence with you?

A Cindy Bliton. (Phonetic spelling.)

Q Do you own that property or do you rent it?

A I rent it.

Q Do you have a written lease?

A No.

Q Who owns the property?

[*24]

A Thomas McGinnis.

Q What is the size of the property that you rent from Mr. McGinnis?

A I'm not sure. I believe it is a little over five acres.

Q Did you construct the greenhouse?

A Yes.

Q Have you had the opportunity to examine these photographs?

A Not all of them. Just what was passed across in front of me here.

MISS CONDON: I don't have anything further at this time.

MR. SALTON: I have nothing else, Your Honor.

THE COURT: All right, sir. You may call your next witness.

MR. SALTON: Your Honor, that's all we would call.

THE COURT: Does the State wish to call any?

MISS CONDON: May I have just a moment, please?

THE COURT: Sure, and also, if you want to argue anymore about those other pictures, to them going in, I guess, it's the proper time for you to move them into evidence.

MISS CONDON: If not, I'd move them in.

[*25]

THE COURT: Do you want to argue?

MR. SALTON: There are several that simply show the marijuana truck, the marijuana in a pile, the police officers standing in front of the marijuana. I would just submit, they're not relevant to the questions or the issues that are before this Court on the Motion to Suppress. For instance, it looks like L, and I would just show the Court, it simply shows some marijuana growing in the greenhouse.

MISS CONDON: Well, maybe I can look through and maybe withdraw some. Judge, there are just a few here, I have three here that depict photographs of the truck with the marijuana loaded onto it and also the police officers, and these are Exhibit X, W, and Z. I would agree they're probably not relevant, since they depict things that were not on the property at the time that Detective Gell made his observations from the air; however, I think the others are relevant because, even though they were taken from the ground, they show in more detail what Detective Gell observed from the air. And his testimony was that he was able to observe closer or larger the marijuana plants than was actually depicted in a few photographs that were actually

taken from the air, and this, of course, gives the Court some

[*26]

idea of what was actually on the ground for him to observe and, furthermore, he testified that his determination, that there was, in fact, marijuana being grown was based partially on the way the plants were being grown and this, of course, shows the Court the manner in which the plants were being cultivated and grown on the property, and so I would offer them for those purposes.

MR. SALTON: Your Honor, the only thing I would suggest, is that as far as the marijuana in the greenhouse, what he saw from the ground, I submit, there is no relevancy as to what he saw from the air, and that's one of the issues in the motion.

THE COURT: Okay. Do you want to state any objection, any specific ones listed there?

MR. SALTON: Yeah. I would.

THE COURT: Don't get the ones she's taken out.

MR. SALTON: Okay. Now, these you didn't want?

MISS CONDON: Yes. I'm just taking out the ones of the truck and the officers, since they were not on the ground.

MR. SALTON: I object to M, K, L, N. O, Q, T, U, B, Double A, Double B, Double C, Double D, Double E, Double F, Double G, Double H, Double I, -- Number I, and J.

[*27]

MISS CONDON: Judge, I further add that since, at least, three of the Defense Exhibits clearly show the holes in the roof, that those exhibits are relevant, because they show what can be seen through the holes, what is the actual inside, and, further, there was testimony that only two sides of the shed or greenhouse were covered and

these photographs also show that there are two exposed sides and, of course, there are photographs that I'm offering into evidence also to show what is visible through the sides, as well as through the roof.

THE COURT: Okay. I'll except [sic] them into evidence. The probative value of some of them, I think, is fairly small, but we'll except them for purposes of the hearing, anyway. Anything further?

MISS CONDON: No, Your Honor.

MR. SALTON: I have no other rebuttal.

THE COURT: All right, sir, do you wish to argue?

MR. SALTON: I think those witnesses want to leave, some of them have been up all night. I have no objection, if you want to release them.

If the Court pleases, and I will argue at this point. There are two issues that

I think the Court has to reach in this case. The first is the question

[*28]

of whether Mr. Riley had an expectation of privacy in the area of his greenhouse and what was growing in that greenhouse. And, I think, the Court has to reach that issue first. And the second issue would be whether or not the acts of the police officers in any way violated my client's Constitutional rights to that expectation of privacy.

First, in regards to the question of the expectation of privacy. Recently what has been developed is what is called the "open field" doctrine. And the Supreme Court of the United States recently kind of reiterated the "open field" doctrine in the case of Oliver versus United States. It's found at 104, Supreme Court, 1735.

Now, we find this case cited in many of the other lower court cases when they talk about the "open field" doctrine, and basically, in that case, the Court not affirmed, but kind of reiterated and give its stamp of approval of an earlier Supreme Court case called Hester versus State. But, the point in Oliver, and I want to read to the Court, it says basically, "An individual may not legitimately demand privacy for actions conducted out of doors and fields except in the area immediately surrounding the home."

And that particular language is used now to make

[*29]

a distinction between areas in open fields or open areas that are not immediately surrounding the home, and the ones that are surrounding the home, to distinguish where this expectation of privacy should begin.

And, with that in mind, I would cite to the Court the case of State versus Rowe, which is 422, Southern Second, 75. This is a Second District Court of Appeals. Here, in Rowe, the defendant had a back yard surrounded by a chain link fence and there was marijuana growing in his back yard. The police went to an adjacent property, not on the defendant's, and with the use of binoculars, they were able to see the marijuana growing in the middle of the defendant's vegetable garden. He had it in the field, but surrounded by a vegetable garden.

The Court says the criteria they must decide is whether or not the defendant manifested an actual expectation of privacy. And I'll just read briefly for the Court and they said, "In the instant case, we

think appellee manifested a comparable expectation of privacy, which must be preserved. As in Richard, the existence of the chain link fence was indicium of a desire for privacy. Moreover, the marijuana was planted in the midst of a vegetable garden."

[*30]

So, in this case, even though the police were able to view the marijuana from the adjoining property with the use of binoculars, they found that here the defendant had an expectation of privacy and the seizure of the marijuana was suppressed.

Probably the next case is one of a more important cases. State versus Rickard, which is found at 420, Southern Second 303. It's Supreme Court of Florida of 1982. Here marijuana plants were also in the defendant's back yard. There was a chain link fence around the back yard and in this particular case, he had put up a plywood partition blocking the view from one side. The view was not blocked and the marijuana was clearly visible from a citrus grove, which was behind the defendant's home and in this case the police observed the marijuana from that citrus grove.

Here, the Court discussed three times of the "open view" cases. They said, here is what they call a prior valid intrusion. That's the old, and it's called the "open view" case, where the police are in the area, they have a right to be, generally, a home or some other protected area, and find marijuana growing. Then there is what they call the nonintrusion, where both the police officer and the contraband are in a non-Constitutionally protected area, and then the

[*31]

third area is a preintrusion. Here the officer is located out of a protected area and is looking inside.

In the Rickard case, they specifically ruled that because of the defendant putting a chain link fence around the property, that they decided that he also exhibited the expectation of privacy. Here they further pointed out, and this becomes important, and this is a distinction they make. "However, the back yard of the marijuana plants were completely open to view from a privately owned orange grove behind the yard."

Since the owners were up north, people may not have been in the grove often, but the police had been asked to keep an eye on the grove for trespassers, therefore, the defendant's back yard was open to view by the police, possibly grove walkers and meandering neighbors. And the Court, basically, said he had an expectation of privacy, but he left that open to view.

So, they didn't necessarily find that the police officers going back there were in violation, but the police officers seized the property without a warrant, so they threw out the search. But, I think the reason they're throwing out the search warrant was not where the police were, but the fact that they didn't

[*32]

get a warrant.

The two things that are important here is the fact of the chain link fence showed the defendant did have an expectation of privacy. It's interesting to note that they cite and talk about Harmen versus State, which is 376, Southern Second 634, where they said, "A person who has exhibited an actual expectation of privacy, should be recognized, as long as society finds it

reasonable." And then they went on to cite Huffer versus State, 344 Southern Second, 1332, which actually came out of Pasco County, which was a case that Judge Keough, which he allowed the seizure of marijuana from the defendant's greenhouse. That was subsequently reversed on appeal.

In Huffer, they just talk about the defendant had a hothouse, had lumber, and sheets of plastic. There was a tear in the hothouse through where the police officers observed the marijuana. They had actually gone on the defendant's property to observe the marijuana and they found that here the hothouse was between ten and forth feet from the residence. The plastic sheets, they said, were not used to permit view, but allowed to permit sunlight. It's not located on or near a public thoroughfare. It was behind the defendant's residence. The plants were not

[*33]

visible to the public and they found that, thus, he had that expectation of privacy, and I think it's important, because all those facts are very much similar to here.

Another case that has importance is the DeMontmorency versus State. And this is cited at Supreme Court of Florida, case number 61,179, October 28, 1982. It's Florida Law Weekly, 10/29/82. And in that case, the marijuana was growing on the defendant's property. She had approximately ten acres, but to get to the property, the police had to drive, they went through an open gate into a pasture adjacent to the property in question, then they parked their cars and crossed over the fence into a rough wooded area of the defendant's.

Prior to crossing the fence, they did not see the marijuana growing, but it was seen by them only after travelling a distance

of some 300, feet inside the fence. Subsequently, the marijuana was seized.

The one point in the language that is important here, it said, "The defendant, in the present case, exhibited an actual expectation of privacy by choosing to live in a very secluded area protected by fencing and three large dogs."

If the Court will bear with me for a minute, I'm

[*34]

looking for the exact language and I thought I had it marked, but I can't seem to find it. But the Court said the fact that because there was simply a break in the woods and the marijuana was visible, because of some break in the trees, does not bring that out of the expectation of privacy and I think that's important, because we see here that there was some slats missing from the roof and, though, he exhibited that expectation of privacy, the fact that there were some slats missing, does not take that out of the realm.

In any event, under Rickard, the mere visibility of the cannabis through the crack in a densely wooded forest does not outweigh the fact that the defendant clearly intended to hide the property in question; that society is willing to honor this objective manifested of an expectation of privacy and was acknowledged by this Court in State versus Morsman, 394 Southern Second 409. That's the point I'm getting at and that's a Supreme Court of Florida 1982.

I think, if you look at these cases, where they find the fact that an individual has an expectation of privacy, because they put a chain link fence around the property or it's in the middle of a vegetable patch or one side is blocked off or it's clearly --

it's deep within a wooded area and the only reason you can see it is because of the break of the trees.

And in Huffer, the fact that it's a greenhouse, I think, we clearly can show that the defendant in this case manifested and had that expectation of privacy. So, subsequently, the next question then is, did the actions of the deputies in flying over the defendant's back yard, did that infringe on an area where he had an expectation of privacy?

The first case is Murphy versus State, 413, Southern Second 1268. This is a First District Court of Appeals 1982. Here, a helicopter flew over the property of the defendant and they saw marijuana growing. The hovered to a hundred and fifty feet and used binoculars to identify the marijuana. They then went and got a search warrant.

In that case, the defendant claimed that the Sheriff was conducting an illegal search by flying over that area. The marijuana was not visible from the road and was within a locked gate. The Court allowed the search with the helicopter, and they applied the "open field" doctrine. And they simply said that there was an area observed.

I say, if the area observed does not constitutionally protect it, then the "open field" doctrine prevails.

And here they said, in this particular area, they did not have a reasonable expectation of privacy. The field was clearly visible from neighbors flying over at normal height and the plants were 300, to 450 feet from the appellant's home. So, this clearly

doesn't fall within that curtilage area or as we see in Oliver, the area immediately surrounding the home. So, though, the First District Court of Appeals of Murphy allowed the aerial search, it was clearly distinguishable from our case in terms from the way the marijuana field was not enclosed and it was far from the house.

Next case I would cite, Your Honor, is the Brennan versus State, which is 417, Southern Second 1024. Here, after a tip, the police went to the defendant's residence and walked onto the property and also flew over it with a helicopter and here the marijuana was seen growing along a pathway that connected the plots excuse me, there was a pathway that the marijuana plots were approximately 150 yards away from the home. So, we're talking about 450 feet from the home; but, there were pathways connecting the mobile home to the plot and, again, the Court said, this is a Second District Court of Appeals, they said that citing Murphy, the First District

[*37]

held that, although the premises was protected by a locked gate, the defendant did not have a reasonable expectation of privacy in his marijuana field, which was 300, to 450 feet away from the defendant's home, approximately, the same distance as involved here.

They then found that this area was not constitutionally protected from governmental intrusion and applied the "open field" doctrine. They also indicated they found the observers' altitude was a minor factor but said what is important is the reasonable expectation of privacy that the defendant has in the area.

We also have Castello versus State, which is 442 Southern Second 990, First

District Court of Appeals, November 11, 1983, found at 8, Florida Law Weekly 2653. Here, they spy. They were flying over the area and spotted the marijuana field from approximately a thousand feet and they dropped to 500 feet, and confirmed it. The house was on ten acres.

The case doesn't talk about exactly where in relation to the home the property was or how close the home the marijuana was. They said that the marijuana was not visible from the ground, but it was readily visible from the air and constitutionally, they said, that he had basically, it says here in Murphy, "The appellant did not have a reasonable

[*38]

expectation of privacy in the marijuana patch." The marijuana was spotted in the air and questioned the right to be there, the appellant first saw the marijuana at an altitude from 1000 feet, and made positive identification from approximately 500 feet. In this circumstance, where the marijuana was clearly visible from the air, did not constitutionally protect Castello, and had no reasonable expectation of privacy in his marijuana patch.

We also have, Your Honor, Masters versus State. This is August 3rd. Really it's July 24th, 1984, found at 9, Florida Law Weekly 1647. Here, the marijuana patch is located but 40 feet from the side of his home. It said, "Since it did not lie within a common fence or enclosure and it was manifestly used for commercial rather than for family or domestic purposes associated with the dwelling, it can not be deemed to have been within the curtilage of the home." And they cite Oliver saying that the area around the home to which the activity of the home life extends was protected and

constitutionally, they found that he didn't have an expectation of privacy, but distinguished the fact that it wasn't fenced or was enclosed.

As you can see in our case, this was not only fenced, but the whole thing is enclosed. We also

have, which I feel necessary to bring to the Court's attention, the case of Randal versus State. This one is November 2nd, 1984. Very, very recent. Found at 9, Florida Law Weekly 2354. Here the police, after receiving a tip, went over the defendant's residence with the helicopter. It says, "Flying routine patrol altitude, the officers observed the marijuana plants growing in the back yard." Here the defendant had a fence around the back yard, but the marijuana was apparently, not in a greenhouse or not enclosed and they upheld the view of the marijuana and then certified the question to the Supreme Court.

THE COURT: What DCA was that?

MR. SALTON: This is the Second DCA, and this particular question is certified to the Court: Whether police officers responded to an anonymous tip makes a legally permissible preintrusion, "open view" from the vantage point of the helicopter that travelled at a lawful patrol altitude above an area which an individual has manifested a reasonable expectation of privacy from ground surveillance and the bases of this aerial observation and search warrant justified seizures cited contraband. Very, very close to his situation.

Now, they held in this particular case, the

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police officers acted legally. They did not hover over appellant's property or survey

it from an unreasonably low altitude, nor did they make repeated flights over the property. One of the things they talk about is the fact that it was clear from the air and constitutionally did not have an expectation of privacy. Well, from the air. And they said that he did have a reasonable expectation of privacy, because of the fence he put around it, citing the Rickard, case.

But, the difference between that case and our situation, Your Honor, is not only did Mr. Riley protect that property from the ground viewing, and the pictures will clearly show that there are shrubberies, the place is overgrown and is sort of analogous of the vegetable garden in Rowe; but there were sides on the greenhouse in the area that wasn't sighted and it would clearly show there was shrubbery within a short distance, trees and undergrowth within a short distance from that.

So, there was no evidence that was visible anywhere from the ground and he also exhibited an intent to shield it from the air by the fact that he had a roof over it. Unfortunately, there was some panels missing from the roof, as the picture shows, but he

[*41]

clearly manifested an intention to have that shielded from normal viewing over the air and it obviously, as can be seen by the picture, would not be viewed by someone flying over normal flight.

The pictures specifically, and I would specifically point out H, and A, Your Honor, show that what is getting to be a very low altitude, you can not see what is in that greenhouse. And, to be able to observe what's in that greenhouse, you're going to

have to get significantly lower than what is in those pictures and if Officer Gell didn't get much lower than those photographs, I don't know how he could see, could identify what's in that greenhouse.

He indicates he is a police officer and has seen marijuana growing. Well, you know, as a defense attorney and a former prosecutor, I have seen marijuana growing also in photographs and have seen evidence, you know, of marijuana plants, and, I would submit, that you are going to have to get very low before you are going to be able to identify what's in those greenhouses. And Mr. Riley clearly showed an expectation of privacy not only from the ground, but from the air and, I think, in light of that, and the cases that I have cited, that they, the police in this case, invaded that expectation of privacy,

[*42]

because it's definitely distinguishable from every case that has allowed an aerial search. That's all.

MISS CONDON: First of all, Judge, regarding the photographs, I think it would be inappropriate to base our argument and decision in this case solely upon those photographs, because, as the Court will recall, Detective Gell indicated that he did not photograph the property from every angle from which he viewed it in the helicopter.

And, further, he was able to get a closer or a larger view of the premises than is actually depicted in those photographs. Therefore, we have to base our argument and our decision here on his testimony, not those photographs alone. And as you will recall, he did indicate that he got within such a range as to be able to observe what appeared to him, based

upon his training and experience, to be marijuana plants.

All those case[s] cited by Mr. Salton so far, which regard or which hold that there has been an unreasonable or illegal intrusion upon the defendant's right of privacy, all regard an intrusion made from the ground; in other words, the person has an expectation of privacy from intrusion on the ground, not from the air.

[*43]

I have prepared a short memorandum here I'd like to give to the Court. And these cases, some of which have been cited by Mr. Salton and others not, but, I think what we need to look at here are those cases that deal specifically with aerial observations, and I have not come across one single case in my research which held there was an unreasonable or illegal intrusion made by helicopter or an airplane, by means of an aerial observation.

I think this is a very unique and specialized type of situation here, and in determining this case, I think we should look at the cases that deal specifically with aerial observations. And the reason for that is, let me point out the one case that Mr. Salton cited, and that is State versus Rowe, and that is the one involving the vegetable patch or the vegetable garden, in which some marijuana was being grown.

One thing that was not brought out about that case is that the marijuana plants were from two to twelve inches tall and were growing in the middle of a vegetable garden. Well, that's quite different from the situation we have here. If the Court looks at some of those photographs, we can see that these marijuana plants are, at

least, the height of this greenhouse, approximately, some six to twelve feet

high. This is a lot different than small plants two to twelve inches in height and the Rickard case, although it does talk about a reasonable expectation of privacy, it's different, too, because that involves a back yard and here, of course, we have heard testimony that the defendant's property is some five acres, so we have a different set of circumstances.

And, also in the Rickard case, there was no search warrant that was issued and that was another question that was being considered and another question that the Court had to deal with, is whether that search was legally permissible without a search warrant.

The memorandum that I have submitted, all of these cases, with the exception of the last paragraph, which refers to a different issue, all of those cases I've cited, the Randal case, the Castello case, the Murphy case the recent case, Diehl versus State, which was just decided in this month's, December 3rd, 1984, all of those case deal with aerial observations by either helicopter or an airplane.

And in each one of them, the Courts have stated that there has been no unreasonable search and held that the aerial observations of either a back yard or acreage was permissible. And in some of the cases,

the marijuana was even seized without the benefit of the search warrant.

I'm not saying that a person can not have an expectation of privacy in his back yard or even on it's acreage. But, I think you have got to look at the circumstances and what we have got here is a shed or a

greenhouse or whatever you want to call it, which is not affixed to the house, and which has deliberate openings in the roof.

The photographs depict that these openings let in more than just sunlight. There is one here. This is State's Exhibit, Defense Exhibit Six, and here you can see that these plants are very tall and that they reach almost to the full height of the greenhouse, and that there are openings large enough to permit observation of practically, looks like, from this photograph, the entire plant.

And, so as I said, here we've got a situation where we've got a shed, we've got a greenhouse that's got deliberate openings on the top and it's also got only two sides, two of the side are completely exposed to the outside world, whether from adjacent property or from the air, and I think if you look at these cases, as I've

cited in my memorandum, where the Courts have all held that aerial observations are
[*46]
made from a lawful vantage point; in other words, law enforcement officers have the legal right to be in the air flying over property and if they are there legally, which they have a right to do, then, anything they see, is not an intrusion; in other words, once they are in the air lawfully over a person's property, and if from that vantage point they can see what they determined to be marijuana, that there is no unreasonable intrusion or search or invasion of the defendant's expectation of privacy. And as I've stated, I have not seen one case yet which has held that an aerial observation is an either illegal or unreasonable intrusion on the right of privacy. All the cases are to the contrary, and I don't think it makes any difference

whether they're growing out in the open field or whether they're in some type of a greenhouse or a shed, because the cases say you can be in the air and if you can see them from the air, then there is nor unreasonable intrusion on the person's right to privacy.

THE COURT: Okay.

MR. SALTON: Judge, briefly. Your Honor, the Diehl case that's cited in the memorandum, here it's also a situation where the marijuana plot was significantly far away from the house and in that case an
[*47]
aerial search found a patch of marijuana on a five acre track of property, which belonged to appellant, investigators, officers on the ground was directed to a public road adjacent to appellant's property from where they could also observe the

marijuana patch. They seized the marijuana plants.

While they were there, they saw some more on a path and when they went and seized that, that path took them to a mobile home. So, we're talking about something that is also far away. Though, the State is correct, not one of those cases has suppressed the search. They don't say anything viewing from the air is seizable. Each one specifically discusses why it's allowed. And in the Oliver instance, they say in that particular situation, because of the nature of what's growing, that there was no reasonable expectation of privacy; either it was far away from the house, 300, to 450 feet, so it's not, one, the curtilage, or the one case where they decided that it wasn't fenced and was used for commercial, it doesn't just because it's from the air.

And you can see it's legal. It specifically says, "Since it did not lie within a common fence or enclosure, was manifestly used for commercial rather than for family or domestic purposed associated within

the dwelling, it can not be deemed to be within the curtilage." They're saying, because of the nature that it's there, it doesn't fit within that expectation of privacy. My question is: Did my client manifest an expectation of privacy? Did he manifest it from the ground and did he manifest it from the air?

There is no case that has ruled a search legal where he has shown that type of expectation of privacy. Either it be totally open from the air, or it be completely far away from the house, so it's not within the area of the dwelling. And these pictures, I submit, clearly show that he had that expectation from both the air and the ground. And if you look at G, you can see that, even though there is a side open, and according to the police officer, what was open was in that area between that area and the trailer, as he indicated.

So, that's obviously not viewable to anybody and this area over here, not the area where those structures were, if you look at photograph G, you can see that it surely is not visible from the area of the ground and, though, there it is not fenced, there is significant shrubbery in the area and so forth, around that that's going to shield it.

THE COURT: Apparently, there is a fence, accord-

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ing to these photographs?

MR. SALTON: I meant a side. And I think he showed a manifestation of privacy that none of these cases have shown. And the only thing I'd point out the memorandum talks about is United States versus Leon. Well, what we have here is a question of not a search, we have an unconstitutional search prior to getting the search warrant. This wasn't a situation like Leon, where they got a search warrant and there was an issue later so to what facts they really had that justified the search warrant. We had a constitutionally invalid intrusion prior to the search warrant. So, I would submit, that Leon doesn't apply.

MISS CONDON: Judge, if I may respond to that. I think one of the reasons it does apply is because in his Motion to Suppress, Mr. Salton has alleged that there was not sufficient probable cause to justify the issuance of the warrant, and of course, that's what Leon deals with, and that's why I would cite that to the Court.

So, I think it's applicable in this situation, that a good faith doctrine would indicate that the officers did rely on good faith on the issuance of this warrant, and therefore, any evidence seized should
[*50]
be admissible.

MR. SALTON: My motion has two, one, as I've indicated, I really don't think Kurt Gell could identify those plants from that altitude. And the other is the constitutional intrusion.

THE COURT: Well, I know people, who from 400 feet with a rifle with open sides can hit very small targets, so I'm going to have to accept his word that he can see what he says he can see.

As far as the question as to constitutional law, I'm going to read the

cases before I rule on that. If you want to leave me the copies that you have, the one that are in the Florida Law Weekly, I'd appreciate it.

MR. SALTON: I've got a lot of my own scribbling notes.

THE COURT: That's okay. I'll ignore your scribbling and I'll read them and you'll know one day this next coming week.

MR. SALTON: Okay, Judge, I'll leave them all for you.

(HEARING CONCLUDED).

[*51]

STATE OF FLORIDA)
)
COUNTY OF PASCO)

I, MARY A. FORTNER, Deputy Official Court Reporter and Notary Public, State of Florida at Large,

DO HEREBY CERTIFY that proceedings were had in the captioned matter at the time and place set forth herein; that I was authorized to and did report stenographically said proceedings and testimony and that the foregoing pages, numbered 1 through 50 inclusive, constitute a true and correct transcription of the shorthand report of said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this ___ day of January, 1985, at New Port Richey, Pasco County, Florida.

MARY A. FORTNER
Deputy Official Court Reporter
Sixth Judicial Court

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR
PASCO COUNTY, FLORIDA

STATE OF FLORIDA) Case No. 84-1606CFAWS
)
vs.)
)
MICHAEL RILEY)
)

ORDER

THIS MATTER coming on to be heard on the 14th day of December, 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs. The portion of

the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 15, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which

involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Copies forwarded to:

Marc Salton, Esq.
Office of the State Attorney

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)

Appellant,)

v.) CASE NO. 84-2818

MICHAEL A. RILEY,)

Appellee.)

Opinion filed October 16, 1985.

Appeal from the Circuit
Court for Pasco County;
W. Lowell Bray, Jr., Judge.

Jim Smith, Attorney General,
Tallahassee, and Candance M.
Sunderland, Assistant Attorney
General, Tampa, for Appellant.

Marc H. Salton, New Port
Richey, for Appellee.

GRIMES, Acting Chief Judge.

This appeal passes on the validity of a seizure of marijuana under a search warrant obtained as a result of aerial surveillance.

On appellant's motion to suppress, the trial court entered a comprehensive order which reads as follows:

ORDER

THIS MATTER coming on to be heard on the 14th day of December 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.

The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds: That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise, the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1 DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized

> pursuant to the execution of the search warrant is hereby suppressed.
>
> DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.
>
> /s/ W. Lowell Bray, Jr.
> W. Lowell Bray, Jr.
> Circuit Judge

Though not noted in his order, the trial judge, at the hearing, specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance.

On appeal, the state argues that this case must be reversed on the authority of Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984). We agree.

In order to fully appreciate the Randall decision, it is first necessary to discuss the case of State v. Rickard, 420 So.2d 303 (Fla. 1982). In Rickard, the police had seized marijuana from the defendant's back yard after having observed the

contraband from an orange grove behind the defendant's property. Because the defendant had taken steps to block the view of his back yard from his only adjacent neighbor, the [S]upreme [C]ourt held that the defendant had exhibited a reasonable expectation of privacy in that area and quashed the warrantless seizure. However, the [S]upreme [C]ourt specifically held that the officer's initial observation of the marijuana from the orange grove qualified as a legally permissible preintrusion open view rather than a search. The seizure of the marijuana was not quashed because of the officer's conduct in viewing the defendant's back yard from the nearby grove but because of his failure either to obtain a search warrant authorizing the seizure or to demonstrate an exception to the warrant requirement.

In Randall, the police received a tip that the defendant was growing marijuana behind his house, but the plants could not be observed from the ground because the back yard was surrounded by a reed fence. However, the police were able to identify the marijuana from the vantage point of a helicopter flying at a routine patrol altitude. After analyzing Rickard, the court concluded that the appellant had exhibited a reasonable expectation of privacy from view not only from the ground but also from the air despite the lack of any shielding from aerial observation. Notwithstanding, the court concluded that the aerial surveillance made by the police from a place where they had a legal right to be did not constitute a governmental intrusion which rose to the level of an impermissible search. Thus, the police were entitled to use the information obtained from the aerial view as the basis for

probable cause to obtain a search warrant. The court concluded:

> While the efforts undertaken by police officers in order to gain a view into a constitutionally protected area undoubtedly must be considered in determining the degree of governmental intrusion, we do not deem aerial observation alone to be unreasonably intrusive under the circumstances presented. Society appears willing to accept aerial surveillance as a reasonable and necessary investigative tool in effective modern law enforcement. Furthermore, we do not believe that requiring police to procure a warrant before executing an general aerial overflight such as that conducted in the instant case would significantly advance the protection of legitimate privacy interests. See Oliver v. United States, __ U.S. __, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (addressing, peripherally, aerial surveillance of an open field). In short, we conclude that the non-harassing surveillance conducted in the instant case struck an acceptable balance between society's interest in effective modern law enforcement and the individual's interest in the values protected by the fourth amendment.

458 So.2d at 825-826.

The instant case differs from Randall only in the fact that the appellant had erected a roof over most of his greenhouse. Consequently, this provided a basis for the judge to conclude that appellant had demonstrated a reasonable expectation of privacy from aerial surveillance. However, the Randall case was decided on the same principle because the court acknowledged that by having fenced his property from ground observation, it was unnecessary for the defendant to construct an "opaque bubble" over his back yard in order to manifest a reasonable expectation of privacy, even from aerial surveillance. Therefore, appellant's effort to cover his greenhouse from aerial observation becomes an irrelevant distinction from Randall.

Recognizing that its interpretation was one of first impression in Florida, the Randall court certified a question to

the [S]upreme [C]ourt. Since the parties did not further pursue the case, there is no [S]upreme [C]ourt authority on the subject. Hence, we certify the following question to the [S]upreme [C]ourt as one of great public importance:

> WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

REVERSED.

FRANK and HALL, JJ., Concur.

SUPREME COURT OF FLORIDA

No. 67,906

MICHAEL A. RILEY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[July 9, 1987]

BARKETT, J.

We have for review State v. Riley, 476 So.2d 1354 (Fla. 2d DCA 1985), in which the district court upheld the validity of a seizure of marijuana under a search warrant obtained as the result of aerial surveillance and certified the following as a question of great public importance:

> WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

Because the certified question as stated contains language inconsistent with established search-and-seizure analysis, we restate the question as follows:

> WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

The issue here is one of first impression in this state and one which obviously involves serious questions of public policy. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, answer the restated question in the affirmative, and quash the decision of the district court below.

Petitioner Michael A. Riley rented approximately five acres of rural property on which was located a mobile home which petitioner used as a residence. The greenhouse in question was located ten to twenty feet behind the mobile home. Both buildings were enclosed by a net wire fence. A "DO NOT ENTER" sign was posted in front of the mobile home. The greenhouse was enclosed on two sides; the remaining sides were obscured by trees and shrubbery within the fenced area and the mobile home. Two panels were missing from the roof of the greenhouse, exposing approximately one-tenth of the roof area.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon an anonymous tip that marijuana was being grown on petitioner's property, went to investigate. Unable to discern the contents of the greenhouse from the road, Deputy Gell

obtained a helicopter and flew over petitioner's property at about 400 feet.[1/] Through the openings in the roof and through one or more of the open sides of the greenhouse, he saw what he believed to be marijuana. Based upon his observations from the helicopter, Deputy Gell then obtained a warrant to search the greenhouse.[2/]

The search warrant was executed and forty-four marijuana plants were found growing in the greenhouse. Petitioner was charged with unlawful possession and manufacture of marijuana under

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[1/] The evidence was unclear as to whether the helicopter descended below 400 feet. The helicopter did circle over the greenhouse twice. Riley, 476 So.2d at 1355.

[2/] Although Deputy Gell also took photographs of the greenhouse from the air, the trial judge apparently accepted his statement that he identified the marijuana from the air and not from the photographs. Riley, 476 So.2d at 1355.

section 893.13, Florida Statutes (1983). The trial court granted petitioner's motion to suppress the evidence on the ground that petitioner manifested a reasonable expectation of privacy from aerial surveillance. On appeal, the Second District reversed on the authority of its own decision in Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984),[3] and certified the issue to the Court.

Petitioner, relying on Katz v. United States, 389 U.S. 347 (1967), contends that the aerial surveillance of his greenhouse was a search in violation of his rights under the fourth amendment to the United States Constitution and article I, section 12 of the Florida Constitution. The state counters that the surveillance was a legally

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[3] In that case, the district court certified a similar question to the Court, but the parties did not pursue the issue. Randall, 458 So.2d at 826.

permissable "preintrusion view" in accordance with this Court's decision in State v. Rickard, 420 So.2d 303 (Fla. 1982), and the Second District's decision in Randall v. State. We agree with petitioner that under the facts of this case the helicopter surveillance by the state constituted a search and an impermissible violation of privacy rights.

We begin our analysis with two recent United States Supreme Court decisions involving aerial surveillance, California v. Ciraolo, 106 S.Ct. 1809 (1986), and Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986).[4]

In Ciraolo, police flew over the defendant's property in a fixed-wing plane at a height of 1,000 feet to confirm an anonymous tip that the defendant was growing marijuana in his backyard. The property was surrounded by a ten foot high fence, preventing ground level observation. In Dow Chemical, a government regulatory agency took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000, and 1,200 feet. Extensive security prevented any public viewing of the facility.

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[4] These cases were decided after the decision of the Second District below.

The Court reaffirmed the standard established in Katz and then applied the Katz test to the aerial surveillance which had occurred in each case. Under the Katz standard, the legality of a warrantless police intrusion into allegedly private activities depends upon whether a person has a "reasonable" expectation of privacy in the invaded area. Id., 389 U.S. at 360 (Harlan, J., concurring). In Katz, the Supreme Court abandoned the traditional analysis which defined a search by reference to whether the police had committed a physical trespass, see Olmstead v. United States, 277 U.S. 438 (1928), and shifted the focus to whether the government had violated the privacy upon which the individual had justifiably relied. Katz, 389 U.S. at 353. Recognizing that the "constitutionally protected areas" approach provided no real protection against surveillance techniques made possible through advancing technology, the Court made clear that "the Fourth Amendment protects people, not places."[5/] Id. at 351-52. Thus, "[w]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id.

Katz and its progeny established a two-pronged test for determining whether

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[5/] This does not mean that the location of the observed activities or objects has no bearing on search-and-seizure analysis. The question whether a legitimate expectation of privacy has been invaded generally requires reference to a place. Katz, 389 U.S. at 361.

the government has intruded upon an individual's reasonable expectation of privacy. First, an individual by his conduct must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)); Norman v. State, 379 So.2d 643, 647 (Fla. 1980).

The Ciraolo court, having determined that the yard in question was within the curtilege of the defendant's home, found that "[c]learly--and understandably--" the defendant had met the test of manifesting his own subjective intent and desire to maintain privacy. 106 S.Ct. at 1811. The Court noted that the protection afforded the curtilege [sic] is essentially a protection of families and personal privacy in an area intimately linked to the home

both physically and psychologically "where privacy expectations are most heightened." Id. at 1812.

The inquiry in Ciraolo thereafter centered on the second prong of Katz, specifically, "whether naked-eye observation of the curtilege [sic] by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." Id. at 1812. The Court decided that the expectation was not reasonable where:

> The observations . . . took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they [the police] were able to observe plants readily discernable to the naked eye as marijuana. . . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

106 S.Ct. at 1813 (emphasis supplied, citation omitted).

In Dow Chemical, decided the same date as Ciraolo, the Court upheld the warrantless taking of aerial photographs, again limiting its holding to observations made from public navigable airspace:

> We conclude that the open areas of an industrial plant complex . . . are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; . . . such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 1827 (footnote omitted). The Court also rested its conclusion on the fact that the area at issue was not an area immediately adjacent to a private home, where privacy expectations are most heightened, nor an area where Dow had made any effort to

protect against aerial surveillance. Id. at 1826 n.4.

In light of Ciraolo and Dow Chemical, we believe the state's reliance on Rickard is misplaced. Rickard did not deal with aerial surveillance such as we have here nor with any other modern surveillance technologies against which a citizen can do little to protect. In Rickard, police were lawfully in a neighbor's orange grove when they observed marijuana growing in Rickard's backyard. The plants were open to naked-eye view by any casual observer. Clearly, Rickard had made no attempt to prevent observations from the orange grove and, therefore, had not exhibited a reasonable expectation of privacy in his backyard from naked-eye observations from neighboring property. Accordingly, we held that the police observations in that case were not a search but were a legally permissible "preintrusion view" which occurs when a police officer who is located where any citizen has a right to be can look into the protected area and, in a reasonable manner, observes contraband. Rickard, 420 So.2d at 305; Ensor v. State, 403 So.2d 349, 352 (Fla. 1981).[6] Such observations are generally permissible because an individual has no expectation of privacy in objects or activities knowingly exposed to the public. See Katz, 389 U.S. at 351.

Under Katz, however, the determination of whether a police officer is in a place

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[6] Because the police are not already legally within the protected area when the observation is made, they must obtain a warrant before entering the protected area to seize the contraband. A "preintrusion view" is thus different from the "plain view" exception to the fourth amendment's warrant requirement established in Coolidge v. New Hampshire, 403 U.S. 443 (1971). See Ensor. Under the "plain view doctrine," when police legally within a constitutionally protected area observe, without the benefit of a search, evidence which they have probable cause to believe is contraband, they may seize it without a warrant.

where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point. See, e.g. Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (protracted surveillance of contents of greenhouse with telescopes and lenses of increasing magnitude constitutes a search). Wherever an individual harbors a "reasonable expectation of privacy," he or she is entitled to be free from unreasonable government intrusion.[7]

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[7] Accordingly, we have restated the certified question to avoid the implication that an alleged search might be valid despite the finding that both prongs of the Katz test have been satisfied, to wit, that the appropriately manifested expectation of privacy in the area searched was

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We turn now to the case at hand. As in Ciraolo, there is no question in this case that the first prong of the Katz test has been met. Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earthbound and aerial observation. The fact that a few panels in the roof were missing does not alter our conclusion. Similar efforts have been held to establish a subjective expectation of privacy, and thus to satisfy the first prong of Katz. See e.g., People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986)

7/ (...continued) reasonable.

(reasonable expectation of privacy in greenhouse partially screened by evergreens and from which some roof and side panels were missing), cert. denied, 107 S.Ct. 2200 (1987); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977) (reasonable expectation of privacy in hothouse located on residential premises even though plastic covering may have allowed someone to look in from the outside); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980) (defendant's covering of greenhouse with materials so as to shield contents demonstrated subjective expectation of privacy); Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (subjective expectation of privacy in greenhouse despite four foot square louvered opening for purpose of ventilation).

Moreover, as in Ciraolo, we find that the area in question constituted the curtilege [sic]. State and federal courts have long recognized that the curtilage concept extends to residential backyards and outbuildings located within close vicinity of the residence. Taylor v. United States, 286 U.S. 1, 6 (1932); United States v. Williams, 581 F.2d 451, 454 (5th Cir.1978), cert. denied, 440 U.S. 972 (1979); Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955); State v. Rickard, 420 So.2d 303, 306 (Fla. 1982); Norman v. State, 379 So.2d 643 (Fla. 1980); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977); Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974); State v. Fierge, 673 S.W.2d 855, 856 (Mo.App. 1984); Brown v. Oklahoma City, 721 P.2d 1346, 1349 (Okla. App. 1986).

Traditionally, the fourth amendment provides a high degree of protection to the curtilage of a residence, those areas "immediately adjacent to the home" to which extend "the intimate activity associated

with the 'sanctity of a [person's] home and the privacies of life' [citation omitted] . . ." Oliver v. United States, 466 U.S. 170, 180 (1984). Indeed, the curtilage "has been considered part of [the] home itself for Fourth Amendment purposes. . ." Id. at 170. The reason for this was expressed well by the Sixth Circuit in Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984):

> The doctrine of curtilage is grounded in the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home. The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is . . . true because people have both actual and reasonable expectations that many of the private

> experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place.

We are left with the question of whether the observation from the air in this case violates an expectation of privacy that is reasonable.

After Ciraolo, there is little question that naked-eye observations of marijuana growing in an enclosed backyard from fixed-wing aircraft within navigable airspace do not violate the federal constitution. However, we do not read Ciraolo as sanctioning an unlimited right to any type of examination of residential property from the air. Indeed, we note the care taken to qualify and limit the permissible observation to the "naked eye" from "navigable air space" at an "altitude of

1000 feet" in a "physically nonintrusive manner."[8/]

These are not the facts presently before us. We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in a roof.

As we already have noted, Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a

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[8/] In a footnote to its conclusion, the Court noted that the state conceded that "'[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" Ciraolo, 106 S.Ct. at 1813-14 n.3.

technological advance,[9] we believe it is more susceptible to abuse and invasion of privacy than ground surveillance. As the California Supreme Court recognized in People v. Cook, 41 Cal.3d 373, 382, 221 Cal.Rptr. 499, 505, 710 P.2d 299, 305 (1985), the concept of protected areas has little meaning when it comes to aerial surveillance:

> Purposeful surveillance from the air simply lays open everything and everyone below--whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs--to minute inspection. The usual steps one might take to protect his privacy are useless.

Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities. The first court to find aerial surveillance unconstitutional

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[9] At least one court has so held. United States v. Broadhurst, 805 F.2d 849, 853 n.3 (1986). But see State v. Myrick, 102 Wash.2d 506, 688 P.2d 151 (1984) (rejecting the contention that aircrafts generally are overly intrusive technological devices when used for surveillance purposes).

did so because the police hovered in their helicopter twenty to twenty-five feet above the ground and 125 feet away from appellant's residence in an effort to identify marijuana in a corral. People v. Sneed, 32 Cal. App.3d 535, 108 Cal.Rptr. 146 (1973). Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy. See National Organization For Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945 (N.D.Cal. 1985) (highly disruptive character of low helicopter flights distinguishes them from common airplane overflights to which society is accustomed), remanded, 796 F.2d 276 (9th Cir. 1986). In People v. Sabo, 185 Cal. App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), the court invalidated a warrantless aerial search under circumstances nearly identical to those here. Noting that helicopters may lawfully be operated in nonnavigable airspace,[10] the court concluded that such lawful operation did not fall within the aerial surveillance approved in Ciraolo and Dow Chemical. In reaching this conclusion, the court judicially noticed the unique capabilities of the helicopter as compared to fixed- wing aircraft:

> To say any sighting from a helicopter in nonnavigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed . . . [whereas] [t]he lawfully operated helicopter need stand back only such distance as not to hazard persons or property.

Id. at 175-76.

We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. Cf. Ciraolo, 106 S.Ct. at 1813. The possibility of observation of the interior of a greenhouse by passengers on commercial and private aircraft in the public airways is extraordinarily remote. Even more remote is the possibility that an observer would connect what he or she observed to a specific person. Although petitioner may not have had a legitimate

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[10] The Sabo court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. § 91.79(d) (1986). 230 Cal.Rptr. at 174-75.

C. Law Enforcement Agencies And Courts Have A Need For A Bright Line Rule Permitting Warrantless Naked-Eye Aerial Observation.

Both law enforcement agencies and the courts need a bright line rule for permissible warrantless aerial observation.

The need for such rules with respect to the Fourth Amendment "search" clause for police on the beat -- and in the air -- has long been recognized. "[I]f police are to have workable rules, the balancing of interests . . . must in large part be done on a categorical basis -- not in an ad hoc, case-by-case fashion by individual police officers."[11]

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[11] Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Accord, e.g., New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768, 773 (1981) (quoting LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct. Rev. 127, 141-42).

"Fourth Amendment protections can only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[12] This is because:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible

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[12] Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773, quoting LaFave, supra, at 142.

> of application by the officer in the field.

Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773-74, quoting LaFave, supra, at 141.

The need for a bright line rule as to warrantless aerial observation is equally clear for courts. For now, less than two years after this Court decided Ciraolo, the Florida Supreme Court, purporting to follow Ciraolo, has held a warrantless naked-eye observation from a helicopter in space where it lawfully could be to violate the Fourth Amendment. And the California courts, in seeking to follow Ciraolo in the context of helicopters, have only contradicted each other.[13]

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[13] See note 4, supra, and particularly Sabo, supra, which the decision below followed, and Romo, supra, which disagreed with just about everything the Sabo court said (and which the California Supreme Court also declined to review).

The courts have been deluged with cases involving aerial observations. The reported cases involve helicopters[14] as often as they do fixed-wing aircraft.[15]

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[14] Reported helicopter cases include: United States v. Marbury, 732 F.2d 390 (5th Cir. 1984); United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981); NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), amended, 828 F.2d 536 (9th Cir. 1987); People v. Messervy, 175 Cal. App. 3d 243, 221 Cal. Rptr. 10 (Cal. 2d Dist. Ct. App. 1985); People v. Roberts, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987); People v. Superior Court for County of Los Angeles (Stroud), 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (Cal. 2d Dist. Ct. App. 1974); People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (Cal. 5th Dist. Ct. App. 1973); Izzard v. State, 10 Ark. App. 265, 663 S.W.2d 192 (Ark. Ct. App. 1984); Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984); Masters v. State, 453 So.2d 183 (Fla. 3d DCA 1984); Brennan v. State, 417 So.2d 1024 (Fla. 2d DCA 1982); Murphy v. State, 413 So.2d 1268 (Fla. 1st DCA 1982); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977); Commonwealth v. Beals, 313 Pa. Super. 346, 459 A.2d 1263 (Pa. Super. Ct. 1983); State v. Roode, 63 S.W.2d 651 (Tenn. 1982); State v. Layne, 623 S.W.2d 629 (Tenn. 1981); Goehring v. State, 627 S.W.2d 159 (Tex. Crim. App. 1982); State v. Fierge, 673 S.W.2d 855 (Mo. Ct. App.
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[14] (...continued) 1984); *State v. Rogers*, 100 N.M. 517, 673 P.2d 142 (N.M. Ct. App. 1983); *People v. Abbott*, 105 A.D.2d 1029, 483 N.Y.S.2d 452 (N.Y. App. Div. 1984).

[15] Reported fixed-wing aircraft cases include: *United States v. Bassford*, 601 F.Supp. 1324 (1985), *aff'd*, 812 F.2d 16 (1st Cir. 1987); *United States v. Mullinex*, 508 F.Supp. 512 (E.D. Ky. 1980); *United States v. DeBacker*, 493 F.Supp. 1078 (W.D. Mich. 1980); *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986); *People v. Cook*, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (Cal. 1985); *People v. Stanislawski*, 180 Cal. App. 3d 748, 225 Cal. Rptr. 770 (Cal. 1st Dist. Ct. App. 1986); *People v. Smith*, 180 Cal. App. 3d 72, 225 Cal. Rptr. 348 (Cal. 1st Dist. Ct. App. 1986); *People v. Joubert*, 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (Cal. 5th Dist. Ct. App. 1981); *People v. St. Amour*, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (Cal. 1st Dist. Ct. App. 1980); *Dean v. Superior Court for the County of Nevada*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (Cal. 3d Dist. Ct. App. 1973); *Diehl v. State*, 461 So.2d 157 (Fla. 1st DCA 1984); *Castello v. State*, 442 So.2d 990 (Fla. 1st DCA 1983); *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923 (Ga. Ct. App.), *cert. denied*, 454 U.S. 823, 102 S.Ct. 108, 70 L.Ed.2d 95 (1981); *People v. Lashmett*, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (Ill. App. Ct. 1979), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *Blalock v. State*, 483
(continued...)

Certainly there have been many more cases not reported. A bright line rule will enable more expeditious judicial administration.

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[15] (...continued) N.E.2d 439 (Ind. 1985); *State v. Ryder*, 315 N.W.2d 786 (Iowa 1982); *State v. Davis*, 51 Or. App. 827, 627 P.2d 492 (Or. Ct. App. 1981), *petition denied*, 291 Or. 368, 634 P.2d 1346 (1981); *State v. Bigler*, 100 N.M. 515, 673 P.2d 140 (N.M. Ct. App. 1983); *State v. Farkes*, 71 Or. App. 155, 691 P.2d 489 (Or. Ct. App. 1984); *State v. Bruno*, 68 Or. App. 827, 683 P.2d 1383 (Or. Ct. App. 1984); *State v. Cord*, 103 Wash. 2d 361, 693 P.2d 81 (Wash. 1985); *State v. Cockrell*, 102 Wash. 2d 561, 689 P.2d 32 (Wash. 1984); *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (Wash. 1984) (en banc).

The aircraft in question is apparently not specified in the following cases: *People v. Egan*, 141 Cal. App. 3d 798, 190 Cal. Rptr. 546 (Cal. 3d Dist. Ct. App. 1983); *Tuttle v. Superior Court*, 120 Cal. App. 3d 320, 174 Cal. Rptr. 576 (Cal. 5th Dist. Ct. App. 1981); *Burkholder v. Superior Court for County of St. Crews*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (Cal. 1st Dist. Ct. App. 1979); *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (Ga. Ct. App. 1979); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *State v. Daleganski*, 84 Or. App. 372, 734 P.2d 357 (Or. Ct. App. 1987); *Wellford v. Commonwealth*, 227 Va. 297, 315 S.E.2d 235 (1984); *State v. Grawien*, 123 Wis. 2d 428, 367 N.W.2d 816 (Wis. Ct. App. 1985).

The need for a bright line rule was implicitly recognized by the Florida Supreme Court. Its conclusion that Deputy Gell's warrantless naked-eye aerial observation violated the Fourth Amendment was based on its own bright lines of "navigable airspace," "targeted" observations, and "curtilage." That none of these lines, or its conclusion, is correct does not diminish the need for a bright line rule.

D. The Bright Line Rule As to Warrantless Naked-Eye Aerial Observation Should Permit The Police Observer To See Whatever May Be Seen So Long As The Observer Is Where He Has A Right To Be.

Florida submits the simple direct bright line test for constitutionally permissible naked-eye warrantless aerial observation is that the police observer be where he or she is lawfully permitted to

be. This rule should apply no matter what the aerial platform or vantage point.[16] Florida submits no greater or lesser test of the validity of the observation is constitutionally necessary.

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[16] The rule for constitutionally permissible amplification of naked-eye observation is not presented and cannot be determined in this case. The attack of the court below on the observation here was not that it was secret and not that it was amplified, but rather the observation was made at too low an altitude. This case is not "The Spy In the Sky," a domestic version of Gary Powers' U-2 or the satellite with startling powers of magnification. Although the teaching of Dow, supra, is that some degree of amplification is permissible (use of "floor mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet" (476 U.S. at 230, 106 S.Ct. at 1822, 90 L.Ed.2d at 232), which could "discern equipment, pipes, and power lines as small as 1/2 inch in diameter." Dow Chemical Co. v. United States, 536 F.Supp. 1355, 1357 (E.D. Mich. 1982), rev'd, 749 F.2d 307 (6th Cir. 1984), aff'd, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)), the extent of permissible amplification is not there delimited. Presumably the issue posed by amplification is whether there is a reasonable expectation that one cannot, through amplification, "enter" a space the observer would not otherwise legally have a right to be. That certainly would follow from Katz.

1. There Is No Principled Distinction Between Observation From Fixed-Wing Aircraft And Helicopters So Long As The Police Observer In Each Case Is Where He Has A Right To Be.

So long as the police observer is where he or she has a right to be, there is no principled distinction between observation from a fixed-wing aircraft and a helicopter. For the purpose of observing marijuana cultivating operations, either is simply a platform from which to look. One is constitutionally no better and no worse than the other. As the plethora of cases listed in notes 14 and 15, supra, shows, both have utility in law enforcement.

The Florida Supreme Court, taking its cue from Sabo, was inclined to the belief that all aerial observations are, inherently,

"more susceptible to abuse and invasion of privacy" than ground observations. J.A. 130. But that court expressed further reservations about helicopters, specifically they are "particularly likely to unreasonably intrude upon private activities," and their "virtually unlimited maneuverability and observational capabilities" invade privacy, and, in addition, expressed its belief that one cannot "as easily" observe from a fixed-wing aircraft as from a helicopter. J.A. 130, 131, 133. Since none of these "inherencies" was predicated on any stated factual basis, Florida submits they have no credibility in Fourth Amendment interpretation. To find one type of platform objectionable while another is acceptable must be based on some factual predicate. Otherwise the distinction is not principled.

Fourth Amendment interpretation has required the objective reasonableness of the defendant's expectations of privacy be interpreted in light of current technology. See Katz, supra. That the Framers could not have contemplated the advent of electronic eavesdropping does not make such activity immune from Fourth Amendment review. But technology which is generally known must itself condition the reasonableness of any expectation of privacy. The very fact that law enforcement agencies generally use both fixed-wing aircraft and helicopters is widely known. That the public generally has access to and broadly utilizes this technology for a host of purposes other than law enforcement must further condition (if not eliminate) privacy expectations relating to things seen by unaided vision from aircraft.[17]

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[17] It is axiomatic that "[t]he 'reasonableness' of any governmental intrusion is to be judged from two perspectives -- that of the defendant, (continued...)

That law enforcement agencies use both fixed-wing aircraft and helicopters does not mean their capabilities are identical. Helicopters have truly unique capabilities. See, e.g., R. H. McGowan, Police Helicopters, 33 Air Beat 10 (Nov./Dec. 1987) (part 1 of 3) (Journal of the Airborne Law Enforcement Association).[18] It is just these unique capabilities that make them indispensible to modern law enforcement. E.g., id.[19] Their uses are as varied as the agencies which use them.[20] The FBI, INS, DEA, Coast

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[17] (...continued) considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action." Payton v. New York, 445 U.S. 573, 580 n. 13, 100 S.Ct. 1371, 1377 n. 13, 63 L.Ed.2d 639, 647 n. 13 (1980), quoting Payton v. State, 45 N.Y.2d 300, 310-11, 408 N.Y.S.2d 395, 399, 380 N.E.2d 224, 229 (N.Y. App. Div. 1978), rev'd and remanded, Payton, supra.

[18] The decision below observed, "[T]he [Sabo] court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft" (J.A. 132), then proceeded to quote Sabo out of context for that exact proposition. Id. at 132-33. The decision below in fact, never did say what Sabo had actually judicially noticed: "We judicially notice the unique capabilities of the helicopter (continued...)

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[18] (...continued) to gambol in the sky -- turning, curtsying, tipping, hummingbird-like suspended in space, ascending, descending and otherwise confounding its fixed-wing brethren doomed to fly straight, turn in caution and glidingly descend." People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170, 175 (Cal. 4th Dist. Ct. App. 1986), cert. denied sub nom. California v. Sabo, ___ U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987).

[19] See Brief of Amicus Curiae Airborne Law Enforcement Association, Inc. filed this week in this case.

[20] Police helicopters have been used for aerial surveillance operations since the late 1940s by the New York Police Department and the Los Angeles Sheriff's Department. E.g., McGowan, Police Helicopters, supra, at 11. By the time of the Korean War, helicopters had undergone substantial evolutionary change. The Vietnam War dramatically underscored the helicopter's "new credentials as a multi-purpose tool -- a tool that began to attract the attention of law enforcement." Id. "While there was considerable fad-buying [by police departments] of helicopters during the mid-1960s, it wasn't until the end of the decade that the era of police airborne patrols dawned." Id.

Guard, Border Patrol, Secret Service, and other federal law enforcement agencies' utilization of helicopters vary with specific agency missions.

If law enforcement does not combat crime by utilizing to the fullest at least that technology which is both visible and audible to its target (as is a helicopter), society will be overwhelmed by increasingly sophisticated criminals. "Hign-tech" marijuana cultivation in greenhouses is one example of this increasing sophistication.[21]

The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs.

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[21] See, e.g., Pot Growers Go Indoors, Officials Say, Richmond (In.) Palladium-Item A7 (Mar. 27, 1988) (AP). "Marijuana growers are using sophisticated artificial lighting systems, scientific irrigation techniques, and up-to-date horticultural practices to boost their per-plant marijuana production and their odds of escaping surveillance by police in the air." Id.

How the United States (including Florida) deals with marijuana cultivation in its own backyard (including what the Florida Supreme Court seemed to think was Riley's backyard) is of no small moment to a state like Florida, which is awash in illegal drugs.[22] In Florida's view, the United States and the several states have an obligation, consistent with constitutional requirements, to use helicopters and airplanes for just such aerial surveillance.[23]

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[22] A Domestic War, Too: Fight Against Drugs, Miami Herald at 14A (Apr. 27, 1988) (editorial).

[23] Florida, as one of the United States, has obligations to enforce this country's treaty obligations to eradicate drugs. E.g., Single Convention on Narcotic Drugs, 1961, Done at New York March 30, 1961, entered into force with respect to the United States, June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, Protocol done March 25, 1972, entered into force with respect to the United States, Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

The Florida Supreme Court, rather than engaging in reasoned analysis under the Fourth Amendment, simply injected perjoratives to castigate helicopters' use by law enforcement agencies. J.A. 132. To be sure there may be exceptions to the general bright line rule urged here, in cases where police aerial observations are made in a deliberately harassing manner or, possibly, if there is physical intrusion.[24] But if abuse should occur in use of helicopters for aerial observations, the abuse is visible. The helicopter is not a secret technology where neither its use nor abuse is generally known.

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[24] While "it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case." California v. Sabo, ___ U.S. ___, ___, 107 S.Ct. 2200, 2201, 95 L.Ed. 2d 855, 856 (1987) (White, J., joined by the Chief Justice, dissenting from denial of certiorari). For other possible abuses of the general right to use aerial observations from legal vantage points, see Giancola, supra, 830 F.2d at 550-51; NORML v. Mullen, supra; and United States v. Broadhurst, supra.

In any case, there is no showing of abuse here. Despite the Florida Supreme Court's references to "hovering," the helicopter circled the greenhouse only twice. There is no indication it disturbed Riley's property in any fashion.[25] Neither is there any indication in the record of any other conduct which might be deemed harassing.

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[25] This flight was at 400 feet. In Giancola v. State of West Virginia Department of Public Safety, 830 F.2d 547 (4th Cir. 1987), the plaintiff claimed "the helicopters flew over his property . . . at an altitude of 100 feet" but "admitted that the wind generated by the rotors did not disrupt anything on the ground." 830 F.2d at 548. This suggests why a flight at 400 feet could not create any hazard to persons or property on the surface.

2. None Of The Specific Limitations Suggested By The Florida Supreme Court On Aerial Observation Has Any Constitutional Significance.

In addition to its general objection to helicopters, both as a platform of aerial observation and as a different platform of aerial observation, the Florida Supreme Court objected to helicopter use on the bases that the observation was from too low an altitude and was the result of a "targeted" flight, i.e., a flight to the airspace over Riley's property to look through the open roof panels and open sides of his greenhouse at his 6-12 foot high marijuana plants.

a. Any Limitation On Helicopter Observation Based On Definitions Of "Navigable Airspace" Is Irrational.

The first of the two specific objections raised by the Florida Supreme Court was that the helicopter here flew below the level at which a fixed-wing airplane may lawfully fly. That is incontestible, but it is equally incontestible the pilot was where he lawfully could be. E.g., 14 C.F.R. § 91.79(d); accord, J.A. 133.

The Florida Supreme Court held the helicopter here flew outside of (that is, below) "navigable airspace." This phrase comes from 49 U.S.C. § 1304, which provides, in relevant part, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of

freedom of transit through navigable airspace of the United States."[26]

Both the decision below (and the California court Sabo decision on which it relied) put great store in the fact that the aerial observation upheld in Ciraolo and Dow was performed in "navigable airspace." The decision below introduced this concept through the back door: the helicopter here was assertedly in "non-navigable" airspace, which is then defined, and shown for that reason to fall outside the ambit of Ciraolo and Dow (i.e., as a matter of constitutional law). Hence, after noting the facts in Sabo were "nearly identical to those here," (J.A. 131- 32), the decision below observed, "Noting that helicopters may lawfully be operated in nonnavigable airspace, the [Sabo] court concluded that such _lawful_ operation did not fall within the aerial surveillance approved in _Ciraolo_ and _Dow Chemical_." J.A. 132 (emphasis added).

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[26] 49 U.S.C. § 1301(29) and 14 C.F.R. § 91.79 are set forth in text, supra.

In an accompanying, explanatory footnote the Florida Supreme Court explained the statutory and regulatory source for the _Sabo_ distinction:

> The _Sabo_ court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. Section 91.79(d) (1986). 230 Cal. Rptr. at 174-75.

J.A. 132 n. 10.

For purposes of argument, we may assume the threshold premise that "navigable airspace" is, as a matter of grammar, always above the minimum altitude, since federal statute declares "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301(29). Since a helicopter, unlike an airplane, has no fixed minimum altitude under the regulations construed in the decision below, a helicopter will always be doomed under this reading to fly in nonnavigable airspace unless it happens to fly at altitudes where airplanes (but not helicopters) are required to fly.

Ciraolo and _Dow_ mentioned the phrase "navigable airspace" in the course of stating where the fixed-wing aircraft there involved were located. Since fixed-wing aircraft must fly in "navigable airspace" they were in a place where they had a lawful right to be and the relevance of "navigable airspace" to those cases was establishing the lawfulness of the placement of the vantage point there.

Simple analysis of the regulations considered in the decision below shows they cannot and do not apply to helicopters. Title 14 C.F.R. § 91.79(d) explicitly states that helicopters may be operated at less than the minimum altitudes otherwise prescribed "if the operation is conducted without hazard to persons or property on the surface." Further, 14 C.F.R. § 135.203 provides:

> Except when necessary for takeoff and landing, no person may operate under VFR --...(b) A helicopter over a congested area at an altitude less than 300 feet above the surface.

It is thus not a case of the FAA regulations ignoring helicopters. Rather the regulations set safety rules for where helicopters may lawfully be which are different than those set for fixed-wing aircraft, presumably to reflect the different characteristics of the two kinds of aircraft.

There is thus no structural basis for an "altitude" test. Neither is there any evidence (or allegation) that this helicopter violated the FAA prohibition against creating a surface hazard to person or property. The helicopter here being where it was legally entitled to be, Ciraolo's public vantage point test was met.

b. Any Limitation On Aerial Observation Based On Whether The Observation Is Purposeful, "Targeted" On A Specific Destination As Opposed To Casual, Has No Legal Basis.

The second of the two specific objections raised by the Florida Supreme Court was that this helicopter flight was not "casual" but was "purposeful" ("targeted") on Riley's greenhouse.[27] A

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[27] The Florida Supreme Court distinguished from the "purposeful" flight (J.A. 130) the aircraft "casually flying over the area," (J.A. 133) citing the decision in "Ciraolo, 106 S.Ct. at 1813." See J.A. 133. This phrase may be derived from the words "[a]ny member of the public flying in this airspace who glanced down." At note 2 on that page, the Ciraolo court distinguished between "a 'routine patrol'" and "'focused' observations," addressing the dissent's argument that the former is constitutionally permissible and the latter not with respect to curtilage, and rejecting that argument. Florida here interprets the words "casual" and "routine" to be essentially the same; likewise Florida treats "purposeful," "focused," and "targeted" to be synonymous.

"casual" flight presumably is one for a purpose other than observance of crime, such as traffic patrol (albeit some cases refer to a "routine patrol" and "routine flyovers" to mean something else again). If this distinction, suggested by the dissenting opinion in Ciraolo[28] as having significance, were applied in a rural area (such as that part of Pasco County, Florida-- itself a Florida county with a rather small population -- here involved), then little police aerial observation would be possible, there being little traffic to patrol.

No decision of this Court validates different treatment of "purposeful" observations and observations made during

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[28] See generally Ciraolo, supra, 476 U.S. at 215, 106 S.Ct. at 1814, 90 L.Ed.2d at 218 (1986) (Powell, J., joined by Brennan, Marshall, and Blackman, JJ., dissenting).

"casual" patrols. Ciraolo flatly rejected the distinction.

Nor does logic validate a distinction between the two kinds of observation. The Florida Supreme Court raised this bright line ("purposeful" as opposed to "casual") in the context of Riley's objectively reasonable expectations of privacy. But from the viewpoint of Riley's expectations, why the aircraft appeared overhead seems irrelevant. As Ciraolo observed,

> Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes [or two helicopters] pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

Ciraolo, supra, 476 U.S. at 214 n. 2, 106 S.Ct. at 1813 n. 2, 90 L.Ed.2d at 217 n. 2 (brackets added).

Certainly a "purposeful" observation is more likely to have a successful result than the casual one. One is likely to be inclined to see that which one is focusing on more readily than something one observes merely in passing.[29/] But that tells us

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[29/] Florida does not concede here, even for purposes of argument, that "the details observed here. . . " (J.A. 133), could not just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. There are three reasons for this refusal: First, because the 6-12 foot marijuana plants were conspicuous through the gaping holes left by missing panes in the roof of the greenhouse and through the open-air sides; Second, because there is no evidence in the record of any hovering, it is highly probable that a fixed-wing aircraft at 100 feet higher altitude (assuming the rural "noncongested area" minimum altitude of 500 feet would have applied) would have seen the same things the helicopter observer saw from 400; Third, an officer as equally experienced as Deputy Gell in a fixed wing aircraft flying even at 1,000 feet in an equally targeted flyover probably also

(continued...)

very little. If, on a "casual" flight the passing gaze of a policeman comes upon a greenhouse with part of its roof and two of its sides open to the air, assuredly he will "target" his gaze on the exposed interior. Does this "targeting" of gaze make the observation unlawful? To answer in the affirmative would deny, and destroy, reality. The distinction simply has no logical, or constitutional, basis.[30]

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[29] (...continued) could have seen the 6-12 foot plants below and recognized the plants for what they were. Cf., e.g., Blalock, supra, 483 N.E.2d 439, 441, 443 (where police in airplane saw marijuana through translucent roof of greenhouse from 800-1000 feet; "plane was being used for routine flyovers of [rural c]ounty to detect marijuana crops.").

[30] "That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant." Ciraolo, supra, 476 U.S. 207, 106 S.Ct. at 1813, 90 L.Ed.2d at 217.

c. Concepts Of Curtilage Have Little Relevance As to Aerial Observations And In Any Case Should Not Constitute A General Limitation On Them.

Whatever its relevance, the Florida courts operated on the assumption the greenhouse was part of Riley's curtilage and supported their conclusion that Riley showed a subjective expectation of privacy from warrantless aerial observation by reference to curtilage. Riley recently went so far as to claim curtilage "completely remove[s] the case sub judice from the situation in Ciraolo."[31]

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[31] Respondent's Brief in Opposition to Petition for Certiorari (at 8), Florida v. Riley, ___ U.S. ___, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1987). On the other hand, in his brief in the Florida Supreme Court, Riley described the "aerial search" here as being "very similar" to that in People v. Ciraolo, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (Cal. 1st Dist. Ct. App. (continued...)

The relevance of curtilage to aerial observation is dubious. Ciraolo ignored the suburban backyard (fully and immediately fenced, containing a swimming pool and sundeck), and determined the issue is what the eye can observe, not the place observed.[32] Its existence in this case is, at best, problematical. The fact patterns in the various cases (including all those listed in notes 14 and 15, supra) and the economics of marijuana production

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[31] (...continued) 1984), rev'd, Ciraolo, supra. Brief of Petitioner (at 6), State v. Riley, 511 So.2d 282 (Fla. 1987).

[32] As the dissenters in Ciraolo there pointed out, "The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence." Ciraolo, supra, 476 U.S. at 222 n. 7, 106 S.Ct. at 1817 n. 7, 90 L.Ed.2d at 222 n. 7 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (record citation omitted).

in the United States, show the relatively small production units of such cultivating operations cannot obscure their business nature. The norms associated with the sanctity of the home and the legitimacy of an assertion of privacy expectations surely do not obtain in modern commercial farming (whether cattle, citrus, dairy, or marijuana).[33] The core of the Framers' agrarian context of hearth and home in protecting the curtilage at common law surely did not extend to the kind of greenery at stake here. The box row hedges of Williamsburg and Gunston Hall and the humble ramshackle scrapple of a prairie garden where the pioneer woman raised vegetables for truly "domestic" consumption -- and the privacy expectations thereto attached-- have nothing to do with marijuana production for profit.

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[33] Cultivation of crops is not an intimate activity of the kind protected by the Fourth Amendment. "There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Oliver v. United States, 466 U.S. at 179, 104 S.Ct. at 1741, 80 L.Ed.2d at 222.

The latest decision of this Court bearing on curtilage is *United States v. Dunn*, ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)[34] and application of *Dunn*'s four-part test to this "greenhouse"[35] casts grave doubt on characterization of it as curtilage. This case involves an over-five acre parcel rented on a verbal lease, having a (probably incomplete) perimeter net wire fence. The greenhouse for marijuana cultivating operations was

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[34] While the Florida Supreme Court cited Justice Brennan's dissent in *United States v. Dunn*, ___ U.S. ___, ___, 107 S.Ct. 1134, 1142, 94 L.Ed.2d 326, 338 (1987), it did not mention or consider this Court's opinion nor Justice Scalia's concurrence.

[35] It is not even clear the exposed-to-the-air-on-two-sides shed rises to a dictionary definition of a "greenhouse."

built by the cultivator, who resided nearby in a mobile home. Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business.

Further as Justice Scalia, concurring in *United States v. Dunn*, noted, "What is significant is that the barn was *not* being so used [for intimate activities of the home], whether or not the law enforcement officials knew it."[36]

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[36] *United States v. Dunn*, ___ U.S.____, ___, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring) (emphasis and brackets added) (original context preserved).

E. Neither The Framers' Constitution, Justice Harlan's Constitution, Nor the "Living Constitution" Prohibits The Articulation Of The Requested Bright Line Rule.

As this Court has often explained, "Earlier [i.e., pre-Katz] law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects."[37] Given the Framers' view of physical invasions, the Framers would have presumably had no theoretical objection to warrantless naked-eye aerial observation -- no matter what the airborne vehicle.

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[37] E.g., Payton v. State, 445 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978), rev'd and remanded sub nom. Payton v. New York, 445 U.S. 573, 591 n. 33, 100 S.Ct. 1371, 1382 n. 33, 63 L.Ed.2d 639, 654 n. 33 (1980) (citing Olmstead v. United States, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944 (1928)). There is no suggestion here that any invasion of any physical property of Riley here occurred, nor could there be.

Under our "Living Constitution" concepts of "trespass" and Fourth Amendment interpretation have diverged. This Court has found no violation of the Fourth Amendment even where a trespass is concerned. E.g., Oliver v. United States, supra. Similarly, this Court found, in Katz, that even where no trespass had occurred, there still may be a Fourth Amendment violation. Katz, of course, stretched "the prohibitions of the [Fourth] Amendment. . . to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him."[38]

For two decades Justice Harlan's seminal concurrence in Katz has been the foundation of Fourth Amendment thinking and scholarship. There is now an intellectual struggle among proponents and opponents of warrantless aerial observation to claim his concurring opinion vindicates one position or the other. The Florida Supreme Court decision here is one more such case. Ciraolo likewise purports to follow Katz, although it reaches the opposite historical conclusion from the decision below, and in terms far more persuasive. Perusal of Justice Harlan's concurring opinion in Katz confirms the Ciraolo majority's reading thereof:

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[38] Payton, supra, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing Katz, supra).

> The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in Katz v. United States, 389 U.S., at 361-362, 88 S.Ct., at 516-517, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. Post, at 215-216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see Katz, supra, at 362, 88 S.Ct., at 517, were plainly not aimed at simple visual observations from a public place. . . .
>
> Justice Harlan made it crystal clear that he was resting on the

> reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. . . .
>
> . . . .
>
> One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy.

Ciraolo, supra, 476 U.S. at 214-15, 106 S.Ct. at 1813, 90 L.Ed.2d at 217-218.

Helicopters have been in use since the first quarter of this century and have been in active law enforcement and police aerial observation use since the 1940s. There is then no plausible way to claim Katz or Justice Harlan's concurrence therein remotely cast into doubt the general constitutionality of police warrantless aerial observation. Analysis in terms of a "Living Constitution" likewise permits a bright line test for permissible warrantless naked-eye aerial observations.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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No. 87-764

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,
Petitioner,
vs.
MICHAEL A. RILEY,
Respondent.

On Writ of Certiorari to the Supreme Court
of Florida

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53 pp

QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was:

> Whether the Florida Supreme Court's holding—that ground observations from a helicopter at a lawful altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment—conflicts with *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

This question may be rephrased:

1. Whether this Court should decide that warrantless naked-eyed aerial observation is permissible under the Fourth Amendment so long as the police observer has the legal right to be in the place from which the observation is made.
2. Whether this Court should reject the rules suggested by the Florida Supreme Court as to warrantless naked-eye aerial observations that:
   - An observation from a fixed-wing aircraft in space where it may lawfully be is constitutional but an observation from a helicopter in space where it may lawfully be is not; and
   - An observation made on a casual patrol is constitutional but an observation made on a purposeful patrol "targeted" on specific marijuana cultivating operations is not.

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No. 87-764

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,
Petitioner,

vs.

MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as *Riley v. State,* 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled *State v. Riley,* is reported at 476 So.2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit Court for Pasco County on pretrial motion to suppress (J.A. 92-98), styled *State v. Riley,* is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

JURISDICTION

This Court has jurisdiction to review the decision of the Florida Supreme Court on writ of certiorari under 28 U.S.C. § 1257(3). The decision of the Florida Supreme Court, quashing the decision of the Florida District Court of Appeal and remanding this case for reinstatement of the trial court's suppression order, was rendered on July 9, 1987. J.A. 110. After denial of its motion for rehearing, Florida filed a petition for a writ of certiorari, which this Court granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. It provides, in part:

> Section 1 - No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

49 U.S.C. § 1301(29), relied upon by the Florida Supreme Court, provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

STATEMENT OF THE CASE

The trial court made a succinct statement of facts, which the District Court of Appeal reprinted verbatim:

> The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.
>
> The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.
>
> The major out-building is located about 10′ to 20′ to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

> Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.
>
> On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

J.A. 92-95, *reprinted in* J.A. 100-102.

Certain other facts (or the lack thereof) seem relevant, as may be gleaned from the minimal record.[1]

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[1] The record consists of the fifty-page transcript of the suppression hearing (J.A. 11-91) (much of it legal argument), at which only the deputy sheriff, Kurt Gell, and the defendant, Michael Riley, testified and documentary evidence consisting of a number of photographs (two of which were taken from the air, the balance being taken from the ground after a search warrant was obtained and executed).

a. Deputy Gell had over 14 years experience as a police officer, had observed marijuana as a police officer 100 times, and had in unrelated investigations observed marijuana in the course of aerial observations from airplanes or helicopters on approximately six prior occasions. J.A. 38.

b. The marijuana plants observed here were, in the words of the prosecutor, "at least the height of this greenhouse, [plants] approximately six to twelve *feet* tall." J.A. 78-79 (emphasis added). This statement is fully supported by the photographic exhibits. *See, e.g.,* Def. Ex. 6; State's Ex. 17.

c. As the trial court found, 10% of the top of the greenhouse was exposed to Deputy Gell's view, the opening apparently being caused by the conscious act of "removing or not installing" part of the roof. Furthermore, two of the four sides of the greenhouse were open to the air. J.A. 42-43, 93-94, 101.

d. As the District Court of Appeal noted, Deputy Sheriff Gell testified and the trial judge "specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance." J.A. 88, 104; *see* J.A. 24, 26, 29-31, 34. In other words, although the deputy took two aerial photographs using a camera with a telephoto lens, he could see these 6-12 foot plants with his naked eye.[2]

e. The only direct evidence of a subjective intention to conceal the marijuana cultivating operations was the "DO NOT ENTER" sign noted by the trial judge. Riley did not testify as to his subjective intent or desire.

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[2] The Florida Supreme Court noted this factual ruling. J.A. 113 n. 2.

The Florida courts inferred a subjective intent from the net wire fence around (or partially around) the mobile home and out-buildings, the enclosure of two sides, the partial obscuration of the other two sides, and the corrugated roofing of most of the top of the greenhouse.

f. Riley had an oral lease on the over five-acre tract. J.A. 47-48. After moving into the mobile home on the property, he himself built the greenhouse near the mobile home. *Id.*

g. There was no evidence as to the type of helicopter involved or its capacity to hover. In fact it did not hover, but instead, as the trial court found (J.A. 94-95), it circled the greenhouse twice. J.A. 32.

h. There was no evidence that Deputy Gell photographed any property but Riley's. None of the photographs shows anyone else's property (nor, considering the size and rural nature of the property, would that have been likely).

i. The Florida Supreme Court made four statements about aerial observation. None was based on any record evidence:

1. aerial surveillance is "more susceptible to abuse and invasion of privacy than ground surveillance. . . ." (J.A. 130);

2. helicopter surveillance is "particularly likely to unreasonably intrude upon private activities. . . ." (J.A. 130);

3. helicopters' "virtually unlimited maneuverability and operational capabilities" invade privacy (J.A. 131); and

4. those justices "do not believe" one could "as easily" see what was seen here from a fixed-wing aircraft as from a helicopter. J.A. 133.

Riley was charged by information on August 16, 1984 with two counts of violating Section 893.13, Florida Statutes (1983) (the unlawful manufacture and possession of marijuana). J.A. 3-6. Riley filed a motion to suppress evidence, asserting the warrantless aerial observation constituted a "search." J.A. 7-10.

Despite this rather simple and straightforward factual framework, the three Florida courts below reached exceedingly different legal conclusions.

The trial court, writing in December 1984, granted the motion to suppress (J.A. 91-98), holding Riley had "exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the [Florida] Declaration of Rights." J.A. 95. The trial court further observed, "Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area." J.A. 95-96. While concluding, "Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance" (J.A. 96-97), the trial court expressly did "not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area." *Id.*

The District Court of Appeal, writing in October 1985, unanimously reversed the trial court's suppression order. J.A. 99-109. Finding the Fourth Amendment aerial surveillance question to be one of great public importance, the District Court certified it to the Florida Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(v).

Neither the District Court's nor the trial court's decision, nor Riley's motion or briefs in these courts and the Florida Supreme Court, made any reference whatsoever to any federal "navigable airspace" statutory scheme or to any "minimum altitude" regulations. This was not an issue until the Florida Supreme Court spoke.

The Florida Supreme Court, writing in July 1987 (almost three years after the police aerial observation in question), unanimously quashed the District Court's decision and remanded with instructions to reinstate the trial court's suppression order.[3]

Unlike the lower Florida courts, the Florida Supreme Court discussed this Court's decisions, including in particular (i) Riley's reliance on *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (*"Katz"*), and (ii) this Court's two intervening Fourth Amendment decisions upholding warrantless aerial surveillance, *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (*"Ciraolo"*), and *Dow Chemical Co. v. United States,* 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) (*"Dow"*).

In the Florida Supreme Court's view, *Ciraolo* and *Dow*, far from vindicating Florida, demonstrated its violation of Riley's Fourth Amendment privacy rights because the police helicopter here—unlike the fixed-wing aircraft in those cases—had not been in "navigable airspace" as defined in the United States Code *in pari materia with* Federal Aviation Agency ("FAA") regulations (as interpreted by that court). For this holding, the Florida Supreme Court explicitly followed the intervening decision in *People v. Sabo,* 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (Cal. 4th Dist. Ct. App. 1986), *cert. denied sub nom. California v. Sabo,* .... U.S. ...., 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) (*"Sabo"*).[4] On the basis of *Sabo*, the Florida Supreme Court explained its decision in terms of "navigable airspace."

Explicitly following *Sabo* "under circumstances nearly identical to those here," (J.A. 131-32), the Florida Supreme Court concluded, citing no factual basis, "Although petitioner [Riley] may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet." J.A. 133-34. "Recognizing that the question in this case is a close one, . . ." (J.A. 137), the decision below nevertheless held, "In circling and descending below 'public navigable airspace,'[5] Detective Gell impermissibly invaded Riley's privacy and his observations thus constituted a search under the [F]ourth Amendment to the federal [C]onstitution and [A]rticle I, [S]ection 12 of the Florida Constitution." J.A. 137-38.

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[3] The decision below rested on the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. J.A. 111. This section of the Florida Constitution requires that the search and seizure provisions of the Florida Constitution be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by this Court. Since Florida law is dependent upon the construction given the Fourth Amendment, this Court has power to review the judgment of the Florida Supreme Court under Article I, Section 12. *See, e.g., Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

[4] Recently another California appellate court reached the opposite conclusion from *Sabo* (and the Florida Supreme Court here) on virtually identical facts. *People v. Romo,* 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (Cal. 1st Dist. Ct. App. 1988), *pet. for review denied* (Cal. Apr. 27, 1988) (No. S004819) (*"Romo"*). Compounding the confusion, another division of the same appellate district that decided *Romo* followed *Sabo*. *People v. Roberts,* 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987). (This latter case, however, construed the California Constitution before its amendment by "Proposition 8").

SUMMARY OF THE ARGUMENT

Florida, like most states,[6] is heavily dependent on use of aircraft to detect marijuana cultivating operations as the first step in their eradication. Florida draws no distinctions between types of aircraft used. Both fixed-wing aircraft and helicopters are utilized; both have their functions. In all cases, Florida intends that aircraft be operated lawfully under FAA regulations, that is, that they be piloted in areas where they legally may be. For fixed-wing aircraft this is in "navigable airspace" (1000 feet in urban, 500 feet in rural areas). For helicopters this is at less than the minimums of "navigable airspace," so long as without surface hazard to persons and property.

Florida submits that people today live in the constant presence of both fixed-wing aircraft and helicopters and can have no objectively reasonable expectation of privacy as to matters viewable by unaided vision from any aircraft positioned where it lawfully may be. Florida therefore asks that the decision below be reversed and a bright-line rule be adopted that warrantless naked-eye aerial observation is valid under the Fourth Amendment so long as the aircraft is operated where it lawfully may be.

A bright-line rule is sought because police pilots require one and because the courts require one. A host of cases have tested the constitutionality of aerial observations. Confusion exists in the courts as to the rules for helicopters, as most clearly shown by three recent totally contradictory California court decisions and by the decision below. That decision, while purporting to follow this Court's decision in *Ciraolo*, effectively held helicopters cannot be used to conduct aerial observations unless they fly at minimums required only of fixed-wing aircraft. Under that decision, helicopters, unlike fixed-wing aircraft, may not observe from places where they lawfully may be.

The decision below utilized bright-line rules, determining that aerial observations (i) from a helicopter flying below fixed-wing minimums, or (ii) as the result of a flight "targeted" on specific suspected property, are unconstitutional. Neither of these limiting bright-line rules withstands analysis and both should be rejected.

The decision also concluded that marijuana cultivating operations exposed to the open-air near a mobile home in which the cultivator resides (with a fence around the mobile home and out-buildings), all on an over-five acre tract, rented by the cultivator on a verbal lease constituted part of the curtilage. Florida submits this conclusion is in error, is contrary to the basic rationale of curtilage, and under *Ciraolo* is not the relevant issue.

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[5] The court stated the helicopter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. Based on the concern for technological advances expressed in *Katz*, *supra*, the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the observation by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

[6] See State of Indiana's Brief on behalf of itself and 23 other states and commonwealths as *amici curiae* filed this week in this case.

ARGUMENT

Introduction

This case may be characterized in various ways. How one characterizes this case may well determine the result. Such a result is undesirable just because it is so potentially unpredictable.

This is, for example, a "helicopter case" and the Florida Supreme Court has concluded there is—for Fourth Amendment search purposes—a constitutional difference between airplanes and helicopters.

This is also a "drug case," the target of the aerial observation being suspected marijuana cultivating operations of Riley. That this case involves alleged illegal manufacture and possession of marijuana theoretically should hold no special significance for constitutional and analytical purposes under the Fourth Amendment. Yet, empirically, it seems no coincidence that most aerial observation cases do involve marijuana cultivation—and increasingly also involve greenhouses and functional near-equivalents.

This is also one of a growing number of "greenhouse cases," in which police may utilize aerial observations of the contents of sheds and like structures not viewable from the ground.

Above all, this case is about the legitimacy of asserted or perceived expectations (subjective and objective) of privacy in a world where air traffic is omnipresent.

Aerial surveillance is a new application of the broad constitutional principles behind the prohibition of warrantless search and seizure. First alluded to in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), this Court focused on the issue in *Ciraolo* and *Dow*.[7]

While the law reviews differ as to what factors ought to be taken into account, or are simply hostile to the idea of warrantless aerial surveillance altogether,[8] the academic search for meaningful criteria goes on.[9]

Florida submits this Court should now seize the opportunity afforded by this case to furnish the criteria by articulating suitably neutral Fourth Amendment principles governing police aerial observations in the light of *reasonable* expectations of privacy.

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[7] Note, *Aerial Surveillance Withstands Fourth Amendment Scrutiny*, 23 Tulsa L. J. 259, 281 (Wint. 1987).

[8] *See, e.g.*, Note, California v. Ciraolo, [106 S.Ct. 1809]: *The Demise of Private Property*, 47 La. L. Rev. 1365 (Jul. 1987); Note, *Search and Seizure—Aerial Surveillance—Administrative Inspections*—Dow Chemical v. United States, 106 S.Ct. 1819, 27 Nat. Resources J. 693 (Summ. '87).

[9] *E.g.*, Note, *Constitutional Law—Search and Seizure—Warrantless Aerial Surveillance*—California v. Ciraolo, 106 S.Ct. 1809 (1986), 54 Tenn. L. Rev. 131 (1986); Note, *Criminal Procedure—Warrantless Aerial Surveillance Endorsed*—California v. Ciraolo, 9 Campbell L. Rev. 497 (1987); Note, *Eyes in the Sky, The Fourth Amendment in the Age of Aerial Surveillance*, 52 Mo. L. Rev. 507 (1987); Note, *Fourth Amendment—The Constitutionality of Warrantless Aerial Surveillance*—California v. Ciraolo, 106 S.Ct. 1809 (1986), 77 Sup. Ct. Rev. 602 (1986); Note, *In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment?*—California v. Ciraolo, 40 Sw. L. J. 1133 (1986).

I. WARRANTLESS NAKED-EYE AERIAL OBSERVATION IS PERMISSIBLE WHENEVER THE POLICE OBSERVER IS WHERE HE HAS A RIGHT TO BE.

A. *Ciraolo* Establishes The Rule That Warrantless Naked-Eye Aerial Observation From A Lawful, Public Vantage Point Is Constitutionally Permissible.

Ciraolo set the rule which governs this case, that an aerial observation by unaided vision violates no reasonable expectation of privacy:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States,* 389 U.S. 347, 360 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *See Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).
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> . . . .
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> We turn, therefore, to the second inquiry under *Katz, i.e.,* whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."
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> . . . .

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. . . . "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra,* 389 U.S., at 351, 88 S.Ct., at 511.
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> . . . . That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.

Ciraolo, 476 U.S. 211-14, 106 S.Ct. at 1811-13, 90 L.Ed.2d at 215-17 (some case citations omitted).

The Florida Supreme Court acknowledged that, unlike fixed-wing aircraft which must fly in "navigable airspace," "'[t]he lawfully operated helicopter need stand back only such distance as not to hazard persons or property.'" J.A. 133, quoting *Sabo, supra.* That determination, had *Ciraolo* been accurately followed, would have compelled the opposite answer to the Fourth Amendment question than that which the Florida Supreme Court reached.

B. There Was Not And Could Not Be Any Reasonable Expectation Of Privacy From Naked-Eye Aerial Observation From A Lawful, Public Vantage Point.

There was only the barest evidence that Riley showed even a subjective expectation of privacy, the first prong of the *Katz* test. The incidents of privacy were (i) Riley's mobile home and greenhouse were within an over-five acre tract, (ii) a net wire fence extended around or partly around the mobile home and out-buildings, (iii) a "DO NOT ENTER" sign was posted, (iv) two of the sides of the greenhouse were closed, shrubbery partially covered a third, and the view of the fourth was obscured by the mobile home, and (v) most of the roof was covered. The first three items are merely physical facts or show an intent to exclude trespassers, not viewers. The last two are contradicted by the fact two sides of the greenhouse were not covered and were exposed to view (J.A. 32, 39), and there was enough uncovered space in the roof, as well as the two open-air sides, that one could see in with unaided aerial vision. J.A. 29, 31-32, 41.

If those facts suffice to show a subjective expectation of privacy from aerial observation, then this Court might as well say that prong is self-proving by barebones allegations. *See* J.A. 9, ¶ 9. In fact, this Court has expressed healthy skepticism of claims of subjective expectation on facts far more likely to corroborate such claims.[10]

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[10] *E.g.*, *Ciraolo*, *supra*, 476 U.S. at 211-12, 106 S.Ct. at 1812, 90 L.Ed.2d at 216 ("Whether respondent therefore manifested a subjective expectation of privacy from *all* observations

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But assuming the existence of subjective expectation, Riley could have had no reasonable *objective* expectation of privacy from warrantless naked-eye aerial observation, the second prong of the *Katz* test. Riley could not reasonably assume an observer from an aerial vantage point could not see in through the roof he built and which he did not fully cover, and through the two sides he chose not to close, so as to identify the 6-12 foot plants for what they were.

C. Law Enforcement Agencies And Courts Have A Need For A Bright-Line Rule Permitting Warrantless Naked-Eye Aerial Observation.

Both law enforcement agencies and the courts need a bright-line rule for permissible warrantless aerial observation.

The need for such rules with respect to the Fourth Amendment "search" clause for police on the beat—and in the air—has long been recognized. "[I]f police are to have workable rules, the balancing of interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers."[11]

"Fourth Amendment protections can only be realized if the police are acting under a set of rules which, in most

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of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances.") (emphasis in original).

[11] *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). *Accord, e.g., New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768, 773 (1981) (quoting LaFave, "*Case by Case Adjudication*" *Versus* "*Standardized Procedures*": *The Robinson Dilemma*, 1974 S.Ct. Rev. 127, 141-42).

instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[12] This is because:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773-74, *quoting* LaFave, *supra,* at 141.

The need for a bright-line rule as to warrantless aerial observation is equally clear for courts. For now, less than two years after this Court decided *Ciraolo,* the Florida Supreme Court, purporting to *follow Ciraolo,* has held a warrantless naked-eye observation from a helicopter in space where it lawfully could be to violate the Fourth Amendment. And the California courts, in seeking to follow *Ciraolo* in the context of helicopters, have only contradicted each other.[13]

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[12] *Belton, supra,* 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773, *quoting* LaFave, *supra,* at 142.

[13] See note 4, *supra,* and particularly *Sabo, supra,* which the decision below followed, and *Romo, supra,* which disagreed with just about everything the *Sabo* court said (and which the California Supreme Court also declined to review).

The courts have been deluged with cases involving aerial observations. The reported cases involve helicopters[14] as often as they do fixed-wing aircraft.[15] Certainly

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[14] Reported helicopter cases include: *Giancola v. State of West Virginia Department of Public Safety,* 830 F.2d 547 (4th Cir. 1987); *United States v. Marbury,* 732 F.2d 390 (5th Cir. 1984); *United States v. Allen,* 675 F.2d 1373 (9th Cir. 1980), *cert. denied,* 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981); *NORML v. Mullen,* 608 F.Supp. 945 (N.D. Cal. 1985), *remanded,* 796 F.2d 276 (9th Cir. 1986), *amended,* 828 F.2d 536 (9th Cir. 1987); *People v. Messervy,* 175 Cal. App. 3d 243, 221 Cal. Rptr. 10 (Cal. 2d Dist. Ct. App. 1985); *People v. Roberts,* 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987); *People v. Superior Court for County of Los Angeles (Stroud),* 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (Cal. 2d Dist. Ct. App. 1974); *People v. Sneed,* 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (Cal. 5th Dist. Ct. App. 1973); *Izzard v. State,* 10 Ark. App. 265, 663 S.W.2d 192 (Ark. Ct. App. 1984); *Randall v. State,* 458 So.2d 822 (Fla. 2d DCA 1984); *Masters v. State,* 453 So.2d 183 (Fla. 3d DCA 1984); *Brennan v. State,* 417 So.2d 1024 (Fla. 2d DCA 1982); *Murphy v. State,* 413 So.2d 1268 (Fla. 1st DCA 1982); *State v. Knight,* 63 Haw. 90, 621 P.2d 370 (1980); *State v. Stachler,* 58 Haw. 412, 570 P.2d 1323 (1977); *Commonwealth v. Beals,* 313 Pa. Super. 346, 459 A.2d 1263 (Pa. Super. Ct. 1983); *State v. Roode,* 643 S.W.2d 651 (Tenn. 1982); *State v. Layne,* 623 S.W.2d 629 (Tenn. 1981); *Goehring v. State,* 627 S.W.2d 159 (Tex. Crim. App. 1982); *State v. Fierge,* 673 S.W.2d 855 (Mo. Ct. App. 1984); *State v. Rogers,* 100 N.M. 517, 673 P.2d 142 (N.M. Ct. App. 1983); *People v. Abbott,* 105 A.D.2d 1029, 483 N.Y.S.2d 452 (N.Y. App. Div. 1984).

[15] Reported fixed-wing aircraft cases include: *United States v. Bassford,* 601 F.Supp. 1324 (1985), *aff'd,* 812 F.2d 16 (1st Cir. 1987); *United States v. Mullinex,* 508 F.Supp. 512 (E.D. Ky. 1980); *United States v. DeBacker,* 493 F.Supp. 1078 (W.D. Mich. 1980); *United States v. Broadhurst,* 805 F.2d 849 (9th Cir. 1986); *People v. Cook,* 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (Cal. 1985); *People v. Stanislawski,* 180 Cal. App. 3d 748, 225 Cal. Rptr. 770 (Cal. 1st Dist. Ct. App. 1986); *People v. Smith,* 180 Cal. App. 3d 72, 225 Cal. Rptr. 348 (Cal. 1st Dist. Ct. App. 1986); *People v. Joubert,* 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (Cal. 5th Dist. Ct. App. 1981); *People v. St. Amour,* 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (Cal. 1st Dist. Ct. App. 1980); *Dean v. Superior Court for the County of Nevada,* 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (Cal. 3d Dist. Ct. App. 1973); *Diehl v. State,* 461 So.2d 157 (Fla. 1st

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there have been many more cases not reported. A bright-line rule will enable more expeditious judicial administration.

The need for a bright-line rule was implicitly recognized by the Florida Supreme Court. Its conclusion that Deputy Gell's warrantless naked-eye aerial observation violated the Fourth Amendment was based on its own bright-lines of "navigable airspace," "targeted" observations, and "curtilage." That none of these lines, or its conclusion, is correct does not diminish the need for a bright-line rule.

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DCA 1984); *Castello v. State*, 442 So.2d 990 (Fla. 1st DCA 1983); *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923 (Ga. Ct. App.), *cert. denied*, 454 U.S. 823, 102 S.Ct. 108, 70 L.Ed.2d 95 (1981); *People v. Lashmett*, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (Ill. App. Ct. 1979), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985); *State v. Ryder*, 315 N.W.2d 786 (Iowa 1982); *State v. Davis*, 51 Or. App. 827, 627 P.2d 492 (Or. Ct. App. 1981), *petition denied*, 291 Or. 368, 634 P.2d 1346 (1981); *State v. Bigler*, 100 N.M. 515, 673 P.2d 140 (N.M. Ct. App. 1983); *State v. Farkes*, 71 Or. App. 155, 691 P.2d 489 (Or. Ct. App. 1984); *State v. Bruno*, 68 Or. App. 827, 683 P.2d 1383 (Or. Ct. App. 1984); *State v. Cord*, 103 Wash. 2d 361, 693 P.2d 81 (Wash. 1985); *State v. Cockrell*, 102 Wash. 2d 561, 689 P.2d 32 (Wash. 1984); *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (Wash. 1984) (en banc).

The aircraft in question is apparently not specified in the following cases: *People v. Egan*, 141 Cal. App. 3d 798, 190 Cal. Rptr. 546 (Cal. 3d Dist. Ct. App. 1983); *Tuttle v. Superior Court*, 120 Cal. App. 3d 320, 174 Cal. Rptr. 576 (Cal. 5th Dist. Ct. App. 1981); *Burkholder v. Superior Court for County of St. Crews*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (Cal. 1st Dist. Ct. App. 1979); *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (Ga. Ct. App. 1979); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *State v. Daleganski*, 84 Or. App. 372, 734 P.2d 357 (Or. Ct. App. 1987); *Wellford v. Commonwealth*, 227 Va. 297, 315 S.E.2d 235 (1984); *State v. Grawien*, 123 Wis. 2d 428, 367 N.W.2d 816 (Wis. Ct. App. 1985).

D. The Bright-Line Rule As To Warrantless Naked-Eye Aerial Observation Should Permit The Police Observer To See Whatever May Be Seen So Long As The Observer Is Where He Has A Right To Be.

Florida submits the simple direct bright-line test for constitutionally permissible naked-eye warrantless aerial observation is that the police observer be where he or she is lawfully permitted to be. This rule should apply no matter what the aerial platform or vantage point.[16] Florida submits no greater or lesser test of the validity of the observation is constitutionally necessary.

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[16] The rule for constitutionally permissible amplification of naked-eye observation is not presented and cannot be determined in this case. The attack of the court below on the observation here was *not* that it was secret and *not* that it was amplified, but rather that the observation was made at too low an altitude. This case is *not* "The Spy In the Sky," a domestic version of Gary Powers' U-2, or the satellite with startling powers of magnification. Although the teaching of *Dow, supra,* is that some degree of amplification is permissible (use of "floor mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet" (476 U.S. at 230, 106 S.Ct. at 1822, 90 L.Ed.2d at 232), which could "discern equipment, pipes, and power lines as small as 1/2 inch in diameter," *Dow Chemical Co. v. United States*, 536 F.Supp. 1355, 1357 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th Cir. 1984), *aff'd*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)), the extent of permissible amplification is not there delimited. Presumably the issue posed by amplification is whether there is a reasonable expectation that one cannot, through amplification, "enter" a space the observer would not otherwise legally have a right to be. That that is the issue certainly would follow from *Katz*.

1. There Is No Principled Distinction Between Observation From Fixed-Wing Aircraft And Helicopters So Long As The Police Observer In Each Case Is Where He Has A Right To Be.

So long as the police observer is where he or she has a right to be, there is no principled distinction between observation from a fixed-wing aircraft and a helicopter. For the purpose of observing marijuana cultivating operations, either is simply a platform from which to look. One is constitutionally no better and no worse than the other. As the plethora of cases listed in notes 14 and 15, *supra,* shows, both have utility in law enforcement.

The Florida Supreme Court, taking its cue from *Sabo,* was inclined to the belief that all aerial observations are, inherently, "more susceptible to abuse and invasion of privacy" than ground observations. J.A. 130. But that court expressed further reservations about helicopters, specifically they are "particularly likely to unreasonably intrude upon private activities," and their "virtually unlimited maneuverability and observational capabilities" invade privacy, and, in addition, expressed its belief that one cannot "as easily" observe from a fixed-wing aircraft as from a helicopter. J.A. 130, 131, 133. Since none of these "inherencies" was predicated on any stated factual basis, Florida submits they have no credibility in Fourth Amendment interpretation. To find one type of platform objectionable while another is acceptable must be based on some factual predicate. Otherwise the distinction is not principled.

Fourth Amendment interpretation has required the objective reasonableness of the defendant's expectations of privacy be interpreted in light of current technology. *See Katz, supra.* That the Framers could not have contemplated the advent of electronic eavesdropping does not make such activity immune from Fourth Amendment review. But technology which is generally known must itself condition the reasonableness of any expectation of privacy. The very fact that law enforcement agencies generally use both fixed-wing aircraft and helicopters is widely known. That the public generally has access to and broadly utilizes this technology for a host of purposes other than law enforcement must further condition (if not eliminate) privacy expectations relating to things seen by unaided vision from aircraft.[17]

That law enforcement agencies use both fixed-wing aircraft and helicopters does not mean their capabilities are identical. Helicopters have truly unique capabilities. *See, e.g.,* R. H. McGowan, *Police Helicopters,* 33 Air Beat 10 (Nov./Dec. 1987) (part 1 of 3) (Journal of the Airborne Law Enforcement Association).[18] It is just these

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[17] It is axiomatic that "[t]he 'reasonableness' of any governmental intrusion is to be judged from two perspectives —that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action." *Payton v. New York,* 445 U.S. 573, 580 n. 13, 100 S.Ct. 1371, 1377 n. 13, 63 L.Ed.2d 639, 647 n. 13 (1980), *quoting Payton v. State,* 45 N.Y.2d 300, 310-11, 408 N.Y.S.2d 395, 399, 380 N.E.2d 224, 229 (N.Y. App. Div. 1978), *rev'd and remanded, Payton, supra.*

[18] The decision below observed, "[T]he [*Sabo*] court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft" (J.A. 132), then proceeded to quote *Sabo* out of context for that exact proposition. *Id.* at 132-33. The decision below in fact, never did say what *Sabo* had actually judicially noticed: "We judicially notice the unique capabilities of the helicopter to gambol in the sky—turning, curtsying, tipping, hummingbird-like suspended in space, as-

(Continued on following page)

unique capabilities that make them indispensible to modern law enforcement. *E.g., id.*[19] Their uses are as varied as the agencies which use them.[20] The FBI, INS, DEA, Coast Guard, Border Patrol, Secret Service, and other federal law enforcement agencies' utilization of helicopters vary with specific agency missions.

If law enforcement does not combat crime by utilizing to the fullest at least that technology which is both visible and audible to its target (as is a helicopter), society will be overwhelmed by increasingly sophisticated criminals. "High-tech" marijuana cultivation in greenhouses is one example of this increasing sophistication.[21]

Footnote continued—

cending, descending and otherwise confounding its fixed-wing brethren doomed to fly straight, turn in caution and glidingly descend." *People v. Sabo*, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170, 175 (Cal. 4th Dist. Ct. App. 1986), *cert. denied sub nom. California v. Sabo*, U.S. ——, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987).

[19] *See* Brief of *Amicus Curiae* Airborne Law Enforcement Association, Inc. filed this week in this case.

[20] Police helicopters have been used for aerial surveillance operations since the late 1940s by the New York Police Department and the Los Angeles Sheriff's Department. *E.g.*, McGowan, *Police Helicopters, supra*, at 11. By the time of the Korean War, helicopters had undergone substantial evolutionary change. The Vietnam War dramatically underscored the helicopter's "new credentials as a multi-purpose tool—a tool that began to attract the attention of law enforcement." *Id.* "While there was considerable fad-buying [by police departments] of helicopters during the mid-1960s, it wasn't until the end of the decade that the era of police airborne patrols dawned." *Id.*

[21] *See, e.g., Pot Growers Go Indoors, Officials Say*, Richmond (In.) Palladium - Item A7 (Mar. 27, 1988) (AP). "Marijuana growers are using sophisticated artificial lighting systems, scientific irrigation techniques, and up-to-date horticultural practices to boost their per-plant marijuana production and their odds of escaping surveillance by police in the air." *Id.*

The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs. How the United States (including Florida) deals with marijuana cultivation in its own backyard (including what the Florida Supreme Court seemed to think was Riley's backyard) is of no small moment to a state like Florida, which is awash in illegal drugs.[22] In Florida's view, the United States and the several states have an obligation, consistent with constitutional requirements, to use helicopters and airplanes for just such aerial surveillance.[23]

The Florida Supreme Court, rather than engaging in reasoned analysis under the Fourth Amendment, simply injected pejoratives to castigate helicopters' use by law enforcement agencies. J.A. 132. To be sure there may be exceptions to the general bright-line rule urged here, in cases where police aerial observations are made in a deliberately harassing manner or, possibly, if there is physical intrusion.[24] But if abuse should occur in use of helicopters for aerial observations, the abuse is visible. The helicopter is not a secret technology where neither its use nor abuse is generally known.

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[22] *A Domestic War, Too: Fight Against Drugs*, Miami Herald at 14A (Apr. 27, 1988) (editorial).

[23] Florida, as one of the United States, has obligations to enforce this country's treaty obligations to eradicate drugs. *E.g.*, Single Convention on Narcotic Drugs, 1961, *Done at New York* March 30, 1961, *entered into force with respect to the United States*, June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, *Protocol done* March 25, 1972, *entered into force with respect to the United States*, Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

[24] While "it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case." *California v. Sabo*, ... U.S. ...., ..., 107 S.Ct. 2200, 2201, 95 L.Ed.2d 855, 856 (1987) (White, J., joined by the Chief Justice, dissenting from denial of certiorari). For other possible abuses of the general right to use aerial observations from legal vantage points, see *Giancola, supra*, 830 F.2d at 550-51; *NORML v. Mullen, supra;* and *United States v. Broadhurst, supra.*

In any case, there is no showing of abuse here. Despite the Florida Supreme Court's references to "hovering," the helicopter circled the greenhouse only twice. There is no indication it disturbed Riley's property in any fashion.[25] Neither is there any indication in the record of any other conduct which might be deemed harassing.

2. None Of The Specific Limitations Suggested By The Florida Supreme Court on Aerial Observation Has Any Constitutional Significance.

In addition to its general objection to helicopters, both as *a* platform of aerial observation and as *a different* platform of aerial observation, the Florida Supreme Court objected to helicopter use on the bases that the observation was from too low an altitude and was the result of a "targeted" flight, *i.e.*, a flight *to* the airspace over Riley's property to look through the open roof panels and open sides of his greenhouse at his 6-12 foot high marijuana plants.

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[25] This flight was at 400 feet. In *Giancola v. State of West Virginia Department of Public Safety*, 830 F.2d 547 (4th Cir. 1987), the plaintiff claimed "the helicopters flew over his property . . . at an altitude of 100 feet" but "admitted that the wind generated by the rotors did not disrupt anything on the ground." 830 F.2d at 548. This suggests why a flight at 400 feet could not create any hazard to persons or property on the surface.

a. Any Limitation on Helicopter Observation Based On Definitions Of "Navigable Airspace" Is Irrational.

The first of the two specific objections raised by the Florida Supreme Court was that the helicopter here flew below the level at which a fixed-wing airplane may lawfully fly. That is incontestible, but it is equally incontestible the pilot was where he lawfully could be. *E.g.*, 14 C.F.R. § 91.79(d); *accord*, J.A. 133.

The Florida Supreme Court held the helicopter here flew outside of (that is, below) "navigable airspace." This phrase comes from 49 U.S.C. § 1304, which provides, in relevant part, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through navigable airspace of the United States."[26]

The decision below (and the California court *Sabo* decision on which it relied) put great store in the fact that the aerial observation upheld in *Ciraolo* and *Dow* was performed in "navigable airspace." The decision below introduced this concept through the back door: the helicopter here was assertedly in "non-navigable" airspace, which is then defined, and shown for that reason to fall outside the ambit of *Ciraolo* and *Dow* (*i.e.*, as a matter of constitutional law). Hence, after noting the facts in *Sabo* were "nearly identical to those here," (J.A. 131-32), the decision below observed, "Noting that helicopters may lawfully be operated in nonnavigable airspace, the [*Sabo*] court concluded that such *lawful* operation did not fall within the aerial surveillance approved in *Ciraolo* and *Dow Chemical*." J.A. 132 (emphasis added).

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[26] 49 U.S.C. § 1301(29) and 14 C.F.R. § 91.79 are set forth in text, *supra*.

In an accompanying, explanatory footnote the Florida Supreme Court explained the statutory and regulatory source for the *Sabo* distinction:

> The *Sabo* court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. Section 91.79(d) (1986). 230 Cal. Rptr. at 174-75.

J.A. 132 n. 10.

For purposes of argument, we may assume the threshold premise that "navigable airspace" is, as a matter of grammar, always above the minimum altitude, since federal statute declares " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft." 49 U.S.C. § 1301(29). Since a helicopter, unlike an airplane, has no fixed minimum altitude under the regulations construed in the decision below, a helicopter will always be doomed under this reading to fly in nonnavigable airspace unless it happens to fly at altitudes where airplanes (but not helicopters) are required to fly.

Ciraolo and *Dow* mentioned the phrase "navigable airspace" in the course of stating where the fixed-wing aircraft there involved were located. Since fixed-wing aircraft must fly in "navigable airspace" they were in a place where they had a lawful right to be and the relevance of "navigable airspace" to those cases was establishing the lawfulness of the placement of the vantage point there.

Simple analysis of the regulations considered in the decision below shows they cannot and do not apply to helicopters. Title 14 C.F.R. § 91.79(d) explicitly states that helicopters may be operated at less than the minimum altitudes otherwise prescribed "if the operation is conducted without hazard to persons or property on the surface." Further, 14 C.F.R. § 135.203 provides:

> Except when necessary for takeoff and landing, no person may operate under VFR— . . . (b) A helicopter over a congested area at an altitude less than 300 feet above the surface.

It is thus not a case of the FAA regulations ignoring helicopters. Rather the regulations set safety rules for where helicopters may lawfully be which are different than those set for fixed-wing aircraft, presumably to reflect the different characteristics of the two kinds of aircraft.

There is thus no structural basis for an "altitude" test. Neither is there any evidence (or allegation) that this helicopter violated the FAA prohibition against creating a surface hazard to person or property. The helicopter here being where it was legally entitled to be, *Ciraolo's* public vantage point test was met.

b. Any Limitation On Aerial Observation Based On Whether The Observation Is Purposeful, "Targeted" On A Specific Destination As Opposed To Casual, Has No Legal Basis.

The second of the two specific objections raised by the Florida Supreme Court was that this helicopter flight was not "casual" but was "purposeful" ("targeted") on Riley's greenhouse.[27] A "casual" flight presumably is one for a purpose other than observance of crime, such as traffic patrol (albeit some cases refer to a "routine patrol" and "routine flyovers" to mean something else again). If this distinction, suggested by the dissenting opinion in *Ciraolo*[28] as having significance, were applied in a rural area (such as that part of Pasco County, Florida here involved), then little police aerial observation would be possible, there being little traffic to patrol.

No decision of this Court validates different treatment of "purposeful" observations and observations made during "casual" patrols. *Ciraolo* flatly rejected the distinction.

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[27] The Florida Supreme Court distinguished from the "purposeful" flight (J.A. 130) the aircraft "casually flying over the area," (J.A. 133) citing the decision in "*Ciraolo*, 106 S.Ct. at 1813." *See* J.A. 133. This phrase may be derived from the words "[a]ny member of the public flying in this airspace who glanced down." At note 2 on that page, the *Ciraolo* court distinguished between "a 'routine patrol'" and "'focused' observations," addressing the dissent's argument that the former is constitutionally permissible and the latter not with respect to curtilage, and rejecting that argument. Florida here interprets the words "casual" and "routine" to be essentially the same; likewise Florida treats "purposeful," "focused," and "targeted" to be synonymous.

[28] *See generally Ciraolo, supra*, 476 U.S. at 215, 106 S.Ct. at 1814, 90 L.Ed.2d at 218 (1986) (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

Nor does logic validate a distinction between the two kinds of observation. The Florida Supreme Court raised this bright-line ("purposeful" as opposed to "casual") in the context of Riley's objectively reasonable expectations of privacy. But from the viewpoint of Riley's expectations, why the aircraft appeared overhead seems irrelevant. As *Ciraolo* observed,

> Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes [or two helicopters] pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

Ciraolo, supra, 476 U.S. at 214 n. 2, 106 S.Ct. at 1813 n. 2, 90 L.Ed.2d at 217 n. 2 (brackets added).

Certainly a "purposeful" observation is more likely to have a successful result than the casual one. One is likely to be inclined to see that which one is focusing on more readily than something one observes merely in passing.[29]

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[29] Florida does *not* concede here, even for purposes of argument, that "the details observed here. . ." (J.A. 133), could not just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. There are three reasons for this refusal: First, because the 6-12 foot marijuana plants were conspicuous through the gaping holes left by missing panes in the roof of the greenhouse and through the open-air sides; Second, because there is no evidence in the record of any hovering, it is highly probable that a fixed-wing aircraft at 100 feet higher altitude (assuming the rural "noncongested area" minimum altitude of 500 feet would have applied) would have seen the same things the helicopter observer saw from 400;

(Continued on following page)

But that tells us very little. If, on a "casual" flight the passing gaze of a policeman comes upon a greenhouse with part of its roof and two of its sides open to the air, assuredly he will "target" his gaze on the exposed interior. Does this "targeting" of gaze make the observation unlawful? To answer in the affirmative would deny, and destroy, reality. The distinction simply has no logical, or constitutional, basis.[30]

c. Concepts Of Curtilage Have Little Relevance to Aerial Observations And In Any Case Should Not Constitute A General Limitation On Them.

Whatever its relevance, the Florida courts operated on the assumption the greenhouse was part of Riley's curtilage and supported their conclusion that Riley showed a subjective expectation of privacy from warrantless aerial observation by reference to curtilage. Riley recently went so far as to claim curtilage "completely remove[s] the case *sub judice* from the situation in *Ciraolo.*"[31]

Footnote continued—

Third, an officer as equally experienced as Deputy Gell in a fixed wing aircraft flying even at 1,000 feet in an equally targeted flyover probably also could have seen the 6-12 foot plants below and recognized the plants for what they were. *Cf., e.g., Blalock, supra,* 483 N.E.2d 439, 441, 443 (where police in airplane saw marijuana through translucent roof of greenhouse from 800-1000 feet; "plane was being used for routine flyovers of [rural c]ounty to detect marijuana crops.").

[30] "That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant." *Ciraolo, supra,* 476 U.S. 207, 106 S.Ct. at 1813, 90 L.Ed.2d at 217.

[31] Respondent's Brief in Opposition to Petition for Certiorari (at 8), *Florida v. Riley,* ____ U.S. ____, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1987). On the other hand, in his brief in

(Continued on following page)

The relevance of curtilage to *aerial* observation is dubious. *Ciraolo* ignored the suburban backyard (fully and immediately fenced, containing a swimming pool and sundeck), and determined the issue is what the eye can observe, not the place observed.[32] Its existence in this case is, at best, problematical. The fact patterns in the various cases (including all those listed in notes 14 and 15, *supra*) and the economics of marijuana production in the United States, show the relatively small production units of such cultivating operations cannot obscure their business nature. The norms associated with the sanctity of the home and the legitimacy of an assertion of privacy expectations surely do not obtain in modern commercial farming (whether cattle, citrus, dairy, or marijuana).[33] The core of the Framers' agrarian context of hearth and home in protecting the curtilage at common law surely did not extend to the kind of greenery at

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Footnote continued—

the *Florida* Supreme Court, Riley described the "aerial search" here as being "very similar" to that in *People v. Ciraolo,* 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (Cal. 1st Dist. Ct. App. 1984), *rev'd, Ciraolo, supra.* Brief of Petitioner (at 6), *State v. Riley,* 511 So.2d 282 (Fla. 1987).

[32] As the dissenters in *Ciraolo* there pointed out, "The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence." *Ciraolo, supra,* 476 U.S. at 222 n. 7, 106 S.Ct. at 1817 n. 7, 90 L.Ed.2d at 222 n. 7 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (record citation omitted).

[33] Cultivation of crops is not an intimate activity of the kind protected by the Fourth Amendment. "There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." *Oliver v. United States,* 466 U.S. at 179, 104 S.Ct. at 1741, 80 L.Ed.2d at 222.

stake here. The box row hedges of Williamsburg and Gunston Hall and the humble ramshackle scrapple of a prairie garden where the pioneer woman raised vegetables for truly "domestic" consumption—and the privacy expectations thereto attached—have nothing to do with marijuana production for profit.

The latest decision of this Court bearing on curtilage is *United States v. Dunn*, ... U.S. ...., 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)[34] and application of *Dunn's* four-part test to this "greenhouse"[35] casts grave doubt on characterization of it as curtilage. This case involves an over-five acre parcel rented on a verbal lease, having a (probably incomplete) net wire fence around the mobile home and out-buildings. The greenhouse for marijuana cultivating operations was built by the cultivator, who resided nearby in a mobile home. Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business.

Further as Justice Scalia, concurring in *United States v. Dunn*, noted, "What is significant is that the barn was *not* being so used [for intimate activities of the home], whether or not the law enforcement officials knew it."[36]

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[34] While the Florida Supreme Court cited Justice Brennan's dissent in *United States v. Dunn*, ... U.S. ...., ..., 107 S.Ct. 1134, 1142, 94 L.Ed.2d 326, 338 (1987), it did not mention or consider this Court's opinion nor Justice Scalia's concurrence.

[35] It is not even clear the exposed-to-the-air-on-two-sides shed rises to a dictionary definition of a "greenhouse."

[36] *United States v. Dunn*, ... U.S. ...., ..., 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring) (emphasis and brackets added) (original context preserved).

E. Neither The Framers' Constitution, Justice Harlan's Constitution, Nor The "Living Constitution" Prohibits The Articulation Of The Requested Bright-Line Rule.

As this Court has often explained, "Earlier [*i.e.*, pre-*Katz*] law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects."[37] Given the Framers' view of physical invasions, the Framers would have presumably had no theoretical objection to warrantless naked-eye aerial observation—no matter what the airborne vehicle.

Under our "Living Constitution" concepts of "trespass" and Fourth Amendment interpretation have diverged. This Court has found no violation of the Fourth Amendment even where a trespass is concerned. *E.g.*, *Oliver v. United States*, *supra*. Similarly, this Court found, in *Katz*, that even where no trespass had occurred, there still may be a Fourth Amendment violation. *Katz*, of course, stretched "the prohibitions of the [Fourth] Amendment . . . to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him."[38]

For two decades Justice Harlan's seminal concurrence in *Katz* has been the foundation of Fourth Amendment thinking and scholarship. There is now an intellectual struggle among proponents and opponents of warrantless aerial observation to claim his concurring opinion vindicates one position or the other. The Florida Supreme Court decision here is one more such case. *Ciraolo* likewise purports to follow *Katz*, although it reaches the opposite historical conclusion from the decision below, and in terms far more persuasive. Perusal of Justice Harlan's concurring opinion in *Katz* confirms the *Ciraolo* majority's reading thereof:

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[37] *E.g.*, *Payton*, *supra*, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing *Olmstead v. United States*, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944 1928)). There is no suggestion here that any invasion of any physical property of Riley here occurred, nor could there be.

[38] *Payton*, *supra*, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing *Katz*, *supra*).

> The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz v. United States*, 389 U.S., at 361-362, 88 S.Ct., at 516-517, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. *Post*, at 215-216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz, supra*, at 362, 88 S.Ct., at 517, were plainly not aimed at simple visual observations from a public place. . . .
>
> Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard. . . .
>
> . . . .
>
> One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy.

Ciraolo, supra, 476 U.S. at 214-15, 106 S.Ct. at 1813, 90 L.Ed.2d at 217-218.

Helicopters have been in use since the first quarter of this century and have been in active law enforcement and police aerial observation use since the 1940s. There is then no plausible way to claim *Katz* or Justice Harlan's concurrence therein remotely cast into doubt the general constitutionality of police warrantless aerial observation. Analysis in terms of a "Living Constitution" likewise permits a bright-line test for permissible warrantless naked-eye aerial observations.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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No. 87-764

In The

Supreme Court of the United States

October Term, 1987

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL A. RILEY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

The Question presented may be phrased in the alternative:

A. Whether the surveillance of the interior of a covered greenhouse within the curtilage of a private residence, from the vantage point of a helicopter circling 400 feet or less above the greenhouse and residence, is a search for which a warrant is required.

OR

B. Whether the surveillance of the interior of a residential backyard covered greenhouse in which an individual has manifested an expectation of privacy from aerial observation, from the vantage point of a helicopter circling at 400 feet or less, is a violation of privacy interest society is willing to recognize as reasonable.

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No. 87-764

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In The

Supreme Court of the United States

October Term, 1987

◆

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL A. RILEY,

Respondent.

◆

RESPONDENT'S BRIEF ON THE MERITS

◆

OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as *Riley v. State,* 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled *State v. Riley,* is reported as 476 So.2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit for Pasco County on pretrial motion to suppress (J.A. 92-98), styled *State v. Riley,* is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Article I, Section 23 of the Florida Constitution provides:

> SECTION 23. Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

49 U.S.C. § 1301(29) provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph ~~(b)~~ or (c) of this section if the operation is conducted without hazard to person or property on the surface.

In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

◆

STATEMENT OF THE CASE

Michael Riley was charged by information on August 16, 1984 with two (2) counts of violating Section 893.13, Florida Statutes (1983); the unlawful manufacture and possession of marijuana. J.A. 3-6. Riley filed a Motion to Suppress evidence, (J.A. 7-10), which on December 19, 1984 was granted by the trial court. J.A. 91-98.

The District Court of Appeal, Second District of Florida, reversed the trial court. J.A. 99-109. The Florida Supreme Court unanimously quashed the District Court's opinion, reinstating the trial court's suppression of the marijuana. J.A. 110-139.

The Florida Supreme Court relied on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and held that Riley had a reasonable expectation of privacy in the contents of his greenhouse. Considering the rationale of Katz, the Court noted that the determination of whether a police officer is in a place he or she may have a right to be is not always conclusive of whether particular actions constitute a search.

The court ascertained that Riley's greenhouse was within the curtilage of his home and, consequently, was afforded a high degree of protection. The fact that a few panels were missing from the roof of his greenhouse did not alter the court's conclusion that Riley had manifested an expectation of privacy from both ground and aerial surveillance.

The court determined the contents of Riley's greenhouse were not exposed to the public flying in public navigable airspace and his expectation that they would not be observed through helicopter surveillance at an altitude of 400 feet, was reasonable. The court noted differences between surveillance from aircraft at an altitude of 1,000 feet and a helicopter circling a residence at an altitude of 400 feet.

The court did not base its decision on arbitrary rules of navigable airspace or on the potential abuse of helicopters. Their decision was based upon examining Riley's expectation of privacy in light of *Katz* and *Ciraolo*, finding that unlike *Ciraolo*, the marijuana was not viewable from the "public airways". J.A. 133. Declaring Riley's expectation of privacy reasonable, the court held the surveillance from a helicopter circling Riley's residence at 400 feet, was a search for which a warrant was required.

The Florida Supreme Court also relied upon Article I, Section 23, Florida Constitution, which specifically confers upon citizens of the State of Florida privacy protection from governmental surveillance.

The structure, which has been called a greenhouse throughout this case, does not have the appearance of one in the professional sense, but probably would so be classified within the broad terms of the word, and, consequently, will be referred to as a greenhouse by Respondent in this brief.

Certain findings of fact made by the trial court are found within its order granting Respondent's Motion to Suppress: J.A. 92-97.

1. Of relevance to the question presented are the following factual findings of the trial court:

(a) Respondent, Michael A. Riley, rented a mobile home situated on a parcel of property containing approximately five (5) acres.

(b) On the property were several smaller buildings, the major building located within ten (10) to twenty (20) feet of the rear of the mobile home.

(c) The mobile home and buildings were enclosed or partially enclosed by a wire fence.

(d) There was a "do not enter" sign posted in front of the mobile home.

(e) The mobile home was occupied by Respondent as a dwelling.

(f) The property is located in a rural area and contained numerous trees and shrubs.

(g) The major out building located within ten (10) to twenty (20) feet to the rear of the mobile home is enclosed on two (2) sides. One (1) of the unenclosed sides is open to an area of trees and shrubbery (within the fenced area) which obscures vision into the interior of the building. The remaining open side is obscured by the mobile home and one (1) or more trees.

(h) The building has a roof, in which there are two (2) openings.

2. The contents of the greenhouse were not visible from any adjacent property.

3. Pasco County Sheriff's Deputy, Kurt Gell, and a pilot employed by the Pasco County Sheriff's Department, flew over the property in a helicopter at 400 feet; it being unclear whether the helicopter descended below 400 feet.

4. The helicopter circled the greenhouse twice and through the openings in the roof and one or more sides, Deputy Gell observed marijuana plants.

5. The evidence was subsequently seized pursuant to a search warrant.

6. The trial court made several mixed factual and legal findings:

(a) Respondent exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights.

(b) The greenhouse is within the curtilage and is therefore a constitutionally protected area.

(c) By covering the greenhouse with a roof evidenced "clear indicia" of a desire for privacy from the air.

7. Several other factors within the record have relevancy to the question presented:

(a) Deputy Gell attempted to view the interior of the greenhouse from a public road, but was unable to identify its contents. J.A. 21.

(b) The helicopter first flew over the area and then circled over the top of the residence. J.A. 24 & 26.

(c) The helicopter was "a lot higher" when it first flew in, than when it circled. J.A. 31.

(d) It was at the time that the helicopter *circled* over the residence that Deputy Gell observed the marijuana. J.A. 26.

8. Though it is not completely clear from the record whether the helicopter descended below 400 feet, Deputy Gell indicated during testimony at the Motion to Suppress that the helicopter flew in at one (1) height and then descended to circle Riley's residence. Deputy Gell's testimony was somewhat contradictory. A reasonable interpretation of his testimony could be that the helicopter first flew over Riley's residence at 400 feet and descended to perform the circling maneuvers.

9. Respondent disagrees with the following facts as portrayed by Petitioner:

(a) Assumptions that the marijuana plants were six (6) to twelve (12) feet high is not supported by the record including the photographic evidence. It is unlikely the greenhouse is over eight (8) feet high and only a few plants were near that height.

(b) There is no evidence the holes in the roof were caused by the "conscious act" of the Respondent.

(c) There is set forth within the trial court's order granting the Motion to Suppress, an abundance of direct evidence of Riley's intention to conceal the contents of his greenhouse.

(d) The statement of the Florida Supreme Court that they "do not believe one could easily see" what was seen here from a fixed-wing aircraft as from a helicopter (J.A. 133) was supported by the photographic evidence (Def. Ex. A-l at R-3, J.A. 45, and Def. Ex. H-3 at R-4, J.A. 45) and the testimony of Deputy Gell. J.A. 18-46.

(e) There are no facts indicating Riley was in any way involved in the distribution of marijuana or any business venture involving any illicit drugs.

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SUMMARY OF THE ARGUMENT

Michael Riley manifested a reasonable expectation of privacy from ground and aerial observation in the contents of his greenhouse located ten (10) to twenty (20) feet behind his residence. Riley subjectively and objectively manifested his privacy expectations, evidenced by the normal precautions he took to keep its contents from public view.

The reasonableness of Riley's privacy expectation must be considered with particular reference to two (2) factors:

1. Was the area in which Riley manifested his privacy interest (i.e. the greenhouse) within the curtilage of his residence, and

2. Did he knowingly expose his activities to the general public.

Contemplation of the criteria needed in determining whether Riley's greenhouse is within the curtilage, including the proximity to his residence (here ten (10) to twenty (20) feet), the fact the greenhouse was within the same fence enclosure, the measures he took to secure his privacy in the area and the realities that gardening is an activity associated with the home, leads to the conclusion that Riley's greenhouse was within the curtilage of his residence. That the plants within the greenhouse were not legal, should not, in and of itself, alter this conclusion.

Individual privacy interests within the home and curtilage have long been entrenched within Fourth Amendment history. The curtilage is considered part of the home for Fourth Amendment purposes and Riley may be said to receive a presumption that privacy expectations concerning activities or objects within the curtilage are reasonable.

Though a person, who knowingly exposes his activities may lose the benefit of Fourth Amendment privacy protections, Riley did not so expose the contents of his greenhouse. To dispute the reasonableness of an individual's privacy expectations from aerial surveillance in and around the home, because of the presence of daily air traffic, is to ignore the site of that traffic. Whether Riley exposed the contents of his greenhouse to the public must be ascertained with reference to where the public would reasonably be expected to be. Riley could logically assume that members of the public would not circle his residence in a helicopter at an altitude of 400 feet and attempt to peer into his greenhouse. The contents of that greenhouse were not exposed to the public flying in areas where they would be expected, i.e. public navigable airspace.

The concept of public navigable airspace as used in *Ciraolo* was not a boundary of where permissible aerial surveillance may take place, but an illustration of the location where individuals should expect members of the public using the airways. Activities on the ground readily exposed to people in that airspace lose Fourth Amendment protection. The Florida Supreme Court was cognizant of the meaning of *Ciraolo* and determined that the contents of Riley's greenhouse was not exposed to that vantage point.

To allow an aerial search of a person's home or curtilage merely because the vantage point may have been where a law enforcement officer technically had a legal right to be, ignores reasonable privacy expectations in the home and reverts to the analysis of Fourth Amendment protection referenced to physical intrusion or trespass. Such analysis fails to consider the use of technology to assist in surveillance and would expose the intimate lives of citizens to the government watching from the sky.

The decision of the Florida Supreme Court has a negligible effect on the use of helicopters and other aircraft for legitimate law enforcement purposes, including the apprehension of fleeing felons, and the observation of marijuana growing in the open fields or exposed to the general public.

In *Riley* the Florida Supreme Court correctly applied accepted Fourth Amendment principles in holding that Riley's privacy expectations were reasonable and the aerial surveillance of his greenhouse was a search for a which a warrant was required.

◆

ARGUMENT

I. HISTORICAL PERSPECTIVE

A. Introduction

The case of the *State of Florida v. Michael Riley* involves the extent of a citizen's Fourth Amendment protection from aerial surveillance. More particularly, this court's decision may, in fact, determine whether an individual, within the confines of his private residence, has any constitutional protection from government aerial surveillance. The analysis must, of course, be made within the framework of Fourth Amendment principles and with particular emphasis upon society's recognition of reasonable expectations of privacy within the home and immediate surrounding areas. This court has an opportunity to set the parameters of acceptable aerial surveillance and Respondent Riley urges this court to set those parameters in a manner that is cognizant of the personal and societal values which bestow legitimate privacy interests within the home and curtilage. Respondent urges this court not to lose sight of technological tools, be they of a telescopic, audio or aerial nature, which allow police access to various platforms of observation; instruments which enable surveillance into areas society has consistently defined as private. But, most of all, Respondent urges this court not to lose sight of the legitimate, fundamental and precious rights citizens enjoy, to be free from governmental surveillance of their homes and curtilage; surveillance from which citizens have no shield.

B. History of Fourth Amendment Analysis.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures".[1] Prior to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), Fourth Amendment analysis revolved around the questions of trespass or physical intrusion into a constitutionally protected area.[2] The decision in *Katz* shifted the focal point to a determination of whether a person's "reasonable" or "legitimate" expectations of privacy have been invaded by governmental action.[3]

The shift in Fourth Amendment analysis is credited to Justice Harlan's grasp of the dangers of technological advances on Fourth Amendment protections. Commenting upon the rationale which interpreted the Fourth Amendment in the context of a physical intrusion or lawful vantage point of a search, Justice Harlan stated:

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[1] Amend. IV, U.S. CONST.

[2] *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928); *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942).

[3] *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) in which the concurring opinion of Justice Harlan has evolved as the touchstone of Fourth Amendment analysis. Justice Harlan set forth a two-pronged test: " . . . first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Katz, supra*, 389 U.S. at 359, 88 S.Ct. at 516 (1967) (Harlan, J. concurring). A majority of the court adopted Justice Harlan's rationale in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). There the court also noted: "whether in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances". *Smith v. Maryland, supra*, 442 U.S. at 739, 99 S.Ct. at 2580.

> "It's limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations or privacy may be defeated by electronic as well as physical invasion."[4]

Though *Katz* departed from what was then the traditional concept of Fourth Amendment analysis, Justice Harlan noted that Fourth Amendment determinations generally required a reference to a place.[5]

Consequently, this court today should determine the propriety of the aerial surveillance with particular reference to the two-pronged test of *Katz:* had Michael Riley manifested an expectation of privacy from ground and aerial surveillance, and was that expectation one that society is willing to recognize as reasonable. This court likewise should consider the place in which Respondent harbored his expectation and consider whether it is an area society has bestowed the highest privacy interest and the highest protection from government intrusion.

An attempted analysis of this case, simply based on whether the occupants of the helicopter made their observations from a lawful place (i.e. without a physical intrusion or trespass), would be a regression to the limited pre-Katz Fourth Amendment theory.

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[4] *Katz, supra,* 389 U.S. at 363, 88 S.Ct. at 517 (1967) (Harlan, J. concurring).

[5] *Katz, supra* (Harlan, J. concurring).

II. THE QUESTION: "DID RILEY MANIFEST AN EXPECTATION OF PRIVACY IN THE CONTENTS OF HIS GREENHOUSE AND WAS THAT EXPECTATION REASONABLE?" SHOULD BE ANSWERED IN THE AFFIRMATIVE.

A. Riley's manifestation of an expectation of privacy in the contents of his greenhouse from both ground and aerial observation is amply supported by the record.

Riley evidenced both a subjective and objective expectation of privacy in the contents of his greenhouse. The mobile home in which Riley had a legal[6] possessory leasehold interest (J.A. 47) was situated on approximately five (5) acres of land. J.A. 48. The mobile home and greenhouse were enclosed by a wire fence (J.A. 20) and a "do not enter" sign was posted in front.[7] The greenhouse was within ten (10) to twenty (20) feet of and directly behind the mobile home. J.A. 22. Thick shrubbery and underbrush surrounded the mobile home and greenhouse on at least three (3) sides.[8] Due to the shrubbery, the mobile home and the positioning of the greenhouse directly behind the mobile home, it's contents were not viewable from the public roadway (J.A. 20-21); or from any adjoining property. J.A. 47. A roof was constructed on the greenhouse and though there were two (2) missing panels, the photographic evidence supports the conclusion that the contents of the greenhouse were not visible from altitudes considered navigable airspace.[9] Nor were they readily discernable through the openings in the roof or side, from the low altitude at which the photographs were taken.[10] The Florida Supreme Court's statement: "We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed wing aircraft"[11] was supported by the record. In fact, it is apparent the contents of the greenhouse were not visible from the original altitude of the helicopter as it first flew over Riley's residence and greenhouse. Not until descending and circling did the marijuana become discernable.[12]

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[6] Fla. Stat. § 83.43(2)(b) (1983) and § 83.43(7) (1983).

[7] Order of Circuit Court (J.A. 93).

[8] Def. Ex. A-l, B-2, H-3, G-4, R 3-4, J.A. 45

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[9] 49 U.S.C. 1301 (29) and 14 C.F.R. § 91.79 are set forth in text, *supra*.

[10] Def. Ex. A-l and H-3, R3-4, J.A. 45

[11] *Riley v. State*, 511 So.2d 282 (Fla. 1987) cert. granted, ___ U.S. ___, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1988), J.A. 133.

[12] The testimony of Deputy Gell indicates the helicopter first flew over the house and then descended to a lower altitude and circled Riley's residence at which time the marijuana was observed. The following colloquy is noted:

Q. Now when you got over the property with the helicopter, what did you do?

A. We circled the top, over the top of the residence, observed the greenhouse and saw there was several plants, large, that were growing inside. We could observe *at that time* (emphasis added) that there was marijuana growing inside. at J.A. 26.

(Continued on following page)

From this record, both the trial court and the Florida Supreme Court justifiably determined that Riley manifested an expectation of privacy from aerial and ground observation.

B. Riley's expectation that the contents of his greenhouse would not be subject to aerial observation was *reasonable* and an expectation that society is prepared to honor.

1. An individual is required to take only normal precautions to insure privacy.

The reasonableness of Respondent Riley's expectation of privacy from aerial observation cannot be contingent upon success or lack thereof in concealment of the marijuana within the greenhouse. Obviously if Respondent was completely successful in such concealment, this case would not be before the court. Those invoking the protection of the Fourth Amendment need only take normal precautions to maintain their privacy.[13] Commonly

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(Continued from previous page)

Then the following:

Q. Well, you come over at a certain level, correct, and you were looking at the ground and the trailer at that level, am I correct?

A. Well, when we come in, we were a lot higher than when we circled. at J.A. 30-31.

[13] *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1980) where the court stated: "So far as normal sidewalk traffic was concerned, this fence served that purpose because respondent took normal precautions to maintain his

(Continued on following page)

used technology makes complete concealment of private activities next to impossible and to require more than normal precautions to secure privacy would dismantle Fourth Amendment safeguards.

2. Reasonableness of privacy expectations, should not be determined based on distinctions between the various methods of surveillance.

Government surveillance upon private activities is a threat regardless of the vantage point from which it occurs.[14] Privacy expectations from aerial observation should be considered as legitimate as privacy expectations from ground or electronic observation, as long as "personal and societal values protected by the Fourth Amendment" are violated.

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privacy." (citations omitted), *Ciraolo, supra,* 476 U.S. at __, 106 S.Ct. at 1812 (1986); and, also Justice Powell's concurring opinion: "In considering the reasonableness of asserted privacy expectations, the Court has recognized that no single factor invariably will be determinative. Thus, the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy – that is, precautions customarily taken by those seeking privacy." (citations omitted), *Rakas v. Illinois,* 439 U.S. 128, 152, 99 S.Ct. 421, 435 (1978) (Powell, J. concurring); and, also *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[14] Because of the unique capabilities associated with aerial surveillance, be it the maneuverability of helicopters or high-tech aerial photographic equipment, surveillance from the sky may arguably pose the greatest threat.

3. The public's perception of the presence of everyday air traffic is that of aircraft travelling in the public airways.

To deprecate the reasonableness of Riley's expectation of privacy on the presence of fixed-wing aircraft and helicopters in the airways, is to ignore the obvious. Common public perception of aircraft involve planes and helicopters flying in the public navigable airways, not at altitudes of 400 feet or less and circling private residences. This perception of the location of aircraft in our society endows Riley's expectation of privacy an indicia of reason.

4. Judgments concerning the reasonableness of privacy expectation must consider reference to a place.

In trying to decide whether personal and societal privacy values are at stake, it is frequently necessary to "make reference to a place".[15] That Riley's greenhouse was within the curtilage raises an inference that his privacy expectations were reasonable. Fourth Amendment interpretation generally requires reference to a place. As noted in *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), there is a "societal understanding" which bestows upon particular areas "the most scrupulous protection from government invasion". Deeply entrenched within Fourth Amendment history is the recognition that the home and curtilage are afforded the highest privacy expectations.[16] The court, in *Oliver,* reaffirmed the "open field's doctrine" of *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) but left no doubt that the curtilage is to be considered part of the home for Fourth Amendment purposes.[17] That a particular privacy assertion arises from the home or curtilage may be said to raise a presumption of reasonableness.[18]

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[15] *Katz v. United States, supra,* 389 U.S. at 361, 88 S.Ct. at 516, (1967) (J. Harlan concurring).

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[16] *California v. Ciraolo, supra, Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and, also *Payton v. New York,* 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) where the court stated "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home-a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'." (citations omitted) 445 U.S. 589-590, 100 S.Ct. 1381-1382

[17] *Oliver, supra,* 466 U.S. 179 at 180, 104 S.Ct. at 1742 (1984) "The distinction implies that only the curtilage, not the neighboring fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a mans home and the privacies of life,' *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes."

[18] Besides the long recognized heightened privacy expectations associated with that area note also *United States v. Karo,* 468 U.S. 703, 104 S.Ct. 3296, 82 L.Ed.2d 53 (1984) "At the risk of

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To assume the concept of curtilage has little relevance whether, from aerial or ground surveillance, is disregarding the importance and sanctity given the home and curtilage in Fourth Amendment analysis.

5. Riley is entitled to the heightened privacy expectations in the contents of his greenhouse that is given to the home and curtilage.

Respondent's greenhouse was within the curtilage of his residence. Consideration of the four factors expressed in *United States v. Dunn,* ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), leads to the above conclusion.[19] Riley's greenhouse was only ten (10) to twenty (20) feet directly behind his home (an area that clearly constitutes

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belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." (citations omitted) *Karo, supra,* 468 U.S. at 714-715, 104 S.Ct. at 3303 (1984)

[19] *United States v. Dunn, supra,* ___ U.S. at ___, 107 S.Ct. at 1139, 94 L.Ed.2d at ___, " . . . we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." (citations omitted).

part of the backyard), located in such a manner as to be associated with the family activities, and the home and greenhouse were within the same fence enclosure. Greenhouses are used for planting and/or gardening activities usually associated with the home. That the gardening involved a plant the possession of being illegal, does not by itself remove the greenhouse from the curtilage protection.[20] There was no evidence that a commercial or agricultural business in marijuana was being operated. Forty-two (42) marijuana plants does not translate into an agricultural business even under the rankest of speculation. Riley also took numerous steps to protect the interior of his greenhouse from observation. Pursuant to the criteria of both *Dunn* and traditional concepts of the home and its intimate areas, there is little doubt the greenhouse was within the residential curtilage, and Riley should be afforded the personal and societal values associated with the sanctity of the home which is embedded in our Fourth Amendment traditions.

C. Riley did not expose his activities in a manner to forfeit society's recognition of the privacy interests in his home and curtilage.

Inherent in the teaching of *Katz* is the understanding that objects or activities knowingly exposed to the public

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[20] *People v. Roberts*, 240 Cal. Rptr. 658, 660 (Cal. App. 1987) where the court, in determining a greenhouse to be within the curtilage applying the factors of *Dunn* stated: "The greenhouse was apparently being used for growing plants, an essentially domestic activity." *People v. Roberts, supra*, at 660.

lose Fourth Amendment protection.[21] This reasoning encompasses the obvious – there was no intention manifested to keep them private. Riley, having manifested an expectation of privacy within an area society has consistently recognized as entitled to heightened privacy interests, the question then becomes whether he exposed his activities to the general public (more particularly that segment of the populace engaged in air travel).

Observations of activities or objects within the curtilage from a vantage point outside the curtilage have caused courts considerable difficulty. Judges have attempted to resolve such issues with reference to whether those activities or objects were "knowingly exposed to the general public". Such an analysis must consider the manner of exposure and the area to which it was exposed. Consistent with this rationale, some courts have allowed an observation from outside the curtilage if made from a vantage point where the public has been expressly or implicitly invited[22] or where the individual takes no measures to prevent observation.[23]

A line of cases have developed sustaining privacy rights within the home or curtilage when the observations have taken place from a lawful vantage point outside the curtilage, but from an area not expected to be used by the public at large, or where one would not reasonably expect the public to have been.[24]

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[21] *Katz, supra*, 389 U.S. at 351, 88 S.Ct. at 511, *California v. Ciraolo, supra.*

[22] *Lorenzana v. Superior Court*, 511 P.2d 33 (Cal. 1973).

[23] *State v. Bridges*, 513 A.2d 1365 (Me. 1986).

Several of these cases have arisen after *Ciraolo* and (like the Florida Supreme Court in *Riley),* have refused to extend *Ciraolo* to sanction all observation of the curtilage from lawful vantage points.[25]

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[24] *People v. Lovelace,* 172 Cal. Rptr. 65 (Cal. App. 1985) where the actions of the police standing in a public alleyway peering through knotholes and cracks in the defendant's fence allowing observation of marijuana growing in the defendant's backyard was found to violate reasonable privacy expectations. The court based its determination on the lack of showing that general members of the public would be in the position the officers were. The court stated: "We are of the opinion that the aforementioned line of cases purposively demonstrates that Officer Ford viewed the marijuana plants from a vantage point not expected to be used by the public at large". 182 Cal. Rptr. at 73. Also *People v. Fly,* 110 Cal. Rptr. 158 (Cal. App. 1973).

[25] *State v. Waldschmidt,* 740 P.2d 617 (Kan. App. 1987) declined to extend *Ciraolo* to allow the police to climb upon a barbed-wire fence adjacent to the defendant's fence and peer over defendant's fence, observing marijuana growing in defendant's backyard. The court stated: "The State in the present case argues that *Ciraolo* is controlling. The State contends the sheriff's observations were made from a public vantage point, as anyone could climb the adjacent barbed wire fence and peer into defendant's backyard. According to the State, defendant could have no reasonable expectation of privacy in this regard. The State's interpretation of *Ciraolo* is far too broad. If the State's position were adopted, the curtilage doctrine would be meaningless." 740 P.2d at 623; *Commonwealth v. Lemanski,* 529 A.2d 1085, 1092 (Pa.Super. 1987) in which the court refused to extend *Ciraolo* to allow the police positioned on a road, part

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D. Whether Riley knowingly exposed the contents of his greenhouse to the general public must be ascertained with reference to where one would reasonably expect the public to be.

Should Riley reasonably have expected members of the public to be circling his greenhouse at an altitude of 400 feet or would it be more reasonable to expect the public to be flying overhead in the manner and at the altitudes generally used for air travel[26] and to take reasonable precautions to secure privacy from those public vantage points?

As *Katz*, its progeny, and the recent cases interpreting *Ciraolo* teach us, the lawfulness of the platform of observation is not the criteria, but merely a factor to be

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shrubbery and with binoculars observe marijuana growing within the defendant's greenhouse. The court stated: "A police officer parting shrubbery and peering through binoculars into one's home is certainly an intrusion which infringes upon the values protected by the Fourth Amendment." 529 A.2d at 1092. *United States v. Cuevas Sanchez,* 821 F.2d 248 (5th Cir. 1987) in which the Fifth Circuit Court of Appeals refused to allow *Ciraolo* as justification for the authorities to position a video camera atop a power pole, adjacent to the defendant's property thus allowing observations of the defendant's backyard over his fence. The court stated: "It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally intrusive aerial observation is possible." 821 F.2d at 251.

[26] 49 U.S.C. § 1304 provides in part "There is recognized and declared to exist in behalf of any citizens of the United States a public right of freedom of transit through *navigable airspace* of the United States." (emphasis added).

considered within a much broader context. To require more than reasonable attempts to secure privacy in the home or curtilage and to allow privacy rights so easily evaded simply by reference to a lawful place of observation, would seriously erode Fourth Amendment protection.

In our existing technological age, no activity is secure from government observation. Whether in the form of aerial observation, telescopic equipment, or high resolution devices, citizen's privacy interests in the home and curtilage can easily be avoided.

Sanctioning the use of a police helicopter to conduct surveillance and circle Riley's residence at an altitude and manner not normally expected from the general public and thus circumvent Riley's reasonable privacy precautions, allows Fourth Amendment protections to become meaningless.

Riley manifested an expectation of privacy in the contents of his greenhouse from ground and aerial observation. It cannot be said he exposed his activities to the general public such as to defeat the reasonableness of his privacy expectation. Thus lies the difference between this court's decision in *Ciraolo* and the Florida Supreme Court's decision in *Riley*.

III. THE DECISION OF THE FLORIDA SUPREME COURT IN *RILEY* WAS BASED UPON LEGITIMATE AND SIGNIFICANT DISTINCTIONS BETWEEN *RILEY* AND *CIRAOLO*.

A. Recent cases interpreting aerial surveillance in light of *Ciraolo* are consistent with the Florida Supreme Court's decision in *Riley*.

Though these cases have reached varied results based upon their own factual situations, their results have been consistent with *Ciraolo* and *Riley* Both *People v. Sabo*, 230 Cal. Rptr. 170, cert. denied __U.S. __, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) and *People v. Roberts*, 240 Cal. Rptr. 658 (Cal. App. 1987) held that the actions of law enforcement officers, in circling or hovering over the defendant's greenhouse located within the curtilage of a private residence at altitudes below 500 feet (in *Roberts* it was approximately 300 feet and *Sabo* approximately 400 to 500 feet) in order to look through openings in a greenhouse, constituted a violation of reasonable expectations of privacy.[27]

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[27] It should be noted that contrary to Petitioner's observation, the California courts in *Sabo, supra, Roberts, supra,* and *People v. Romo*, 243 Cal. Rptr. 801 (1988) all reached results consistent with each other and consistent with *Ciraolo*. In *Romo*, the marijuana was growing open to the sky and viewed from airspace of 500 feet or above where the public normally would be expected. This was the same situation as in *Ciraolo*. Although the *Romo* court criticized the *Sabo* court's reasoning, particularly its reliance on "navigable airspace", it concurred with the result in *Sabo*. Likewise, the result in *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) is consistent with *Ciraolo*. There the marijuana within the greenhouse was visible

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B. The Florida Supreme Court determined Riley did not expose the contents of his greenhouse to the public.

Ciraolo's marijuana plants were completely open to observation by any person flying over the area. This public exposure obviated any expectations that the marijuana plants would not be observed by a police officer located in the same place members of the public would be. Ciraolo's actions were analogous to placing potted marijuana plants on a windowsill facing a public thoroughfare. Law enforcement is not required to shield their eyes from what the passing public could readily see. Ciraolo was unable to claim the marijuana was not thus exposed. Riley legitimately can make such a claim. The photographic evidence (Def. Ex. A-l and H-3 at R 3-4, J.A. 45) support such a finding as does the testimony of Deputy Gell.[28] The contents of Riley's greenhouse, only becoming identifiable from the vantage point of a helicopter circling his residence at an altitude of 400 feet or less,[29] does not equate to an exposure to the public. The public engaged in air travel, private or commercial, fixed-wing or helicopters, does not fly at altitudes of 400 feet or less and circle residences.

C. "Public navigable airspace" in *Ciraolo* was not used as a demarcation of the lawful vantage from which aerial observation may occur.

The phrase, "public navigable airspace", served to illustrate that the location of the police observation was a place the public generally used for air travel. Since the marijuana plants were readily discernable from a location Ciraolo should have expected the public to be, he could not have a reasonable expectation that the plants would not be observed.

The facts in Riley are markedly different. The contents of his greenhouse were not exposed to the "public" location described in *Ciraolo*. Riley took more than reasonable precautions to obscure the observations of the contents from such "public" vantage points. One would not reasonably expect the public to circle his residence at

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from an altitude of 1,000 feet, obviously an area where the general public would have been expected to travel. Further, the greenhouse did not appear to be within the curtilage of the residence. See *Blalock v. Indiana*, 483 N.E. 2d 439 (Ind. 1985) where the Supreme Court of Indiana allowed aerial observation of a greenhouse at 800-900 feet, because the greenhouse was not within the curtilage of the home but on the opposite end of seventy-seven (77) acres.

[28] J.A. 24, 26-27, 30-31 Deputy Gell did not testify the marijuana was visible at the altitude at which Riley's residence was first flown over. The marijuana became visible after descending and circling the residence and greenhouse.

[29] Though the Florida Supreme Court indicated it was unclear whether the helicopter descended below 400 feet, *Ciraolo, supra* (J.A. 113), several factors indicate that it did. The testimony of Deputy Gell, though somewhat contradictory, indicates that the helicopter was flying at 400 feet, but they first flew over the residence at one altitude and then circled at a lower altitude. (J.A. 24, 26-27, 3031) The photographic evidence (Def. Ex. A-l, H-3, R-3-4, J.A. 45) also cast doubt that the marijuana was observed at 400 feet.

an altitude of 400 feet or less attempting to peer into a greenhouse. Any member of the public flying at a normal altitude or in a normal manner, who happened to glance down, would not have seen what Deputy Gell observed.[30]

D. The Florida Supreme Court, in *Riley*, correctly applied the criteria of *Katz* and *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

The Florida court raised no objection regarding the purposeful aspect of the helicopter surveillance. This was not a factor in its decision. Petitioner wishes to find issues where there are none. The only reference to "purposeful" is found within a quotation from *People v. Cook*, 710 P.2d 299 (Cal. 1985) (J.A. 130) used by the Florida court as an illustration of the potential intrusiveness on private activities associated with helicopter surveillance.

Though the Florida court noted the intrusive nature of helicopter surveillance, this was not crucial to the result in *Riley*. The intrusiveness and disruption of private activities caused by low flying helicopter surveillance should be considered when attempting to define

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[30] *Riley, supra* (J.A. 133)
Though Florida argues that the helicopter did not hover, there is no testimony to that effect and one can assume that in order to take the photographs, (Def. Ex. A-l and H-3 at R3-4, J.A. 45) some hovering actually must have taken place. Regardless, for Fourth Amendment purposes, circling or hovering over a residence is a distinction without a difference.

parameters of permissible aerial observation. Intrusiveness may take several forms. Common experience observing helicopters landing or taking off obviates the need for specific testimony regarding the intrusiveness of low flying helicopters in terms of noise, wind and general disturbance of serenity. A helicopter at 400 feet or less is more physically intrusive in terms of noise and disruption than one at 1,000 feet. Intrusiveness may also take the form of the ability to observe many aspects of a citizen's private life from the vantage point of a low-flying helicopter. The helicopter flying in the airspace normally used for air travel is less intrusive in both senses.[31]

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[31] The intrusiveness of helicopter surveillance has been documented. In *Nat. Org. For Reform of Marijuana Law v. Mullen*, 608 F. Supp. 945, 955 (N.D. Cal. 1985), remanded for consideration of subsequent authority, F.2d 276 (9th Cir. 1986), the Federal District Court found the following testimony to be uncontradicted: "One morning Charles Keyes was at home with his five-year old son, Arthur, when four helicopters in a diamond shape came within 100 feet of our home, shaking and blowing treetops. At about 9:30 the largest helicopter came back, put the nose of the helicopter about 100 feet away at my eye level (I live on a hillside) and hovered watching me defecate on my outhouse. I didn't move, so he moved right above me. He blew the toilet paper away from me and Arthur had to retrieve it for me. Arthur and I left the property, as I feared for our safety. Marilyn Beckwith was similarly perturbed when she was 'continually buzzed' while taking her outdoor shower. Richard Moller described how he was relaxing in the bedroom of his rural home when a helicopter came flying within 100 feet. The helicopter 'was at tree-top height and the pilot had an unhindered view of my bedroom and bed through the glass door.' Two CAMP helicopters made several passes

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The capacity to see into our personal lives through low altitude helicopter surveillance should cause this court to scrutinize this type of police conduct. But whether a particular surveillance is found to be physically intrusive in a particular case should not be a factor in determining the constitutional limitations on low flying helicopter surveillance, especially considering: (a) the potential for physical intrusion in the form of disturbance; and, (b) the potential for intrusion imposed by surveillance of lawful private activities which are open to view from low altitudes. The lack of a physical intrusion is of little importance if reasonable expectations of privacy are invaded without physical intrusion.[32]

The Florida Supreme Court's decision in *Riley* was not based upon a fabricated bright-line rule between "purposeful" and "casual" helicopter flights, nor did it rely on the California Appellate court's decision in *California v. Sabo, supra.* The Florida court noted the factual similarities along with the California court's reasoning regarding navigable airspace, but did not base its decision on the fact the helicopter was below navigable airspace. Their decision was based upon analysis of Michael Riley's legitimate expectation of privacy in the contents of his backyard greenhouse. The court applied the rationale of *Ciraolo* and reasonably determined that the contents of the greenhouse were not exposed to the view of the general public flying in the public airways. The significant difference between viewing the interior of the greenhouse from the public airways with that of descending and circling Riley's residence at 400 feet or less, related directly to the reasonableness of his expectations of privacy. The Florida Supreme Court decision was an analysis of a factual situation different from that of *Ciraolo* and correctly applied the rationale of *Katz, Oliver.* and *Ciraolo.*

IV. A BRIGHT-LINE RULE THAT AERIAL OBSERVATION IS LAWFUL SO LONG AS THE POLICE OBSERVER IS WHERE HE HAS A LEGAL RIGHT TO BE IS A DEPARTURE FROM ESTABLISHED FOURTH AMENDMENT PRINCIPLES.

A. Since *Katz* and its progeny, the focus of Fourth Amendment analysis has been whether reasonable privacy interests have been violated[33] or as recently phased, "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment".[34]

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at about 100 to 150 feet over Susan McManus' home, 'flying at an angle so the people in the helicopter could observe us and what we were doing'."

[32] Though the 9th Circuit Court of Appeals in *Giancola v. State of West Virginia Department of Public Safety,* 830 F.2d 547 (4th Cir. 1987) discussed several factors to consider, but a single surveillance of the home or curtilage when reasonable privacy interests have been established with or without physical intrusion or disruption, is just as damaging to Fourth Amendment rights.

[33] *Katz, supra.*

[34] *Oliver, supra,* 466 U.S. at 182-183, 104 S.Ct. at 1743 (1984).

An attempt to decide this case simply upon a reference to the lawfulness of the platform of observation, ignores the prevailing theory of Fourth Amendment protection and regresses to the pre-*Katz* determination of "trespass" or "physical intrusion". If by positioning themselves in an aerial location (artificially claimed as a lawful vantage point due to the lack of F.A.A. violations[35]) and from that platform observe activities in the curtilage and the home, Fourth Amendment protection becomes a hollow echo of the past. From such vantage points all intimate activities of the home become open to police observation and citizens can do little to shield themselves from such invasion, short of boarding up windows and erecting roofs over back yards. From low altitudes, surveillance of the interior of homes through large picture windows, or glass areas becomes possible. Living and bath areas become visually accessible through sky lights. If Riley had a skylight in his home and a potted marijuana plant was observed through that skylight by the occupants of a helicopter circling his residence at an altitude of 400 feet or less, under Florida's

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[35] At lease one case *State v. Davis*, (Or. App. 1981) noted that F.A.A. regulations were designed to promote safety and were not rules for individual's reasonable expectations of privacy. If Petitioner is attempting to insinuate F.A.A. regulations have specific altitude limitations on helicopters, it should be noted. 14 C.F.R. § 135.203(b) refers only to congested areas. Consequently, one could argue a helicopter could descend as low as 25 feet off the ground and be within F.A.A. regulations as long as the descent could be accomplished safely. Obviously, then the regulations have no relationship to reasonable Fourth Amendment privacy protections.

proposed theory, such observation would be permissible. Homes are constructed to allow entry of fresh air, sunlight and the beauty of nature, not police surveillance. Society values are not such as to require access to air, light and nature be eliminated in order to prohibit the eye of the government. Since the curtilage is entitled to the same Fourth Amendment protection as the home, looking through openings in a structure is equated with looking through openings in a private residence.[36]

Not only do picture windows and skylights lend themselves to low-flying aerial observation, but windows in multi-story buildings are particularly susceptible to low altitude aerial surveillance. Under Florida's proposed rule, if lawful operation is the criteria and a police helicopter can lawfully descend to fifty (50) feet or less over a residential backyard, then everything exposed to the occupant's view, loses Fourth Amendment protection. Florida's proposed bright-line rule would allow such government intrusion since it fails to consider privacy interests in the home and curtilage. If the determination is only whether the police have a lawful right to be at that location, Florida, in a sense is requesting a "plain view" doctrine without the requirement of inadvertence.[37]

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[36] *Oliver, supra.*

[37] *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

If, as Florida asserts,[38] the police cannot, from a lawful vantage point, use telescopic or electronic listening equipment to gain access to a home or curtilage, there can be no constitutional difference with police use of a low flying and circling helicopter to gain the same access. The Fourth Amendment deprivation to the citizen is the same.

B. Florida's bright-line rule, even when phrased in terms of "naked-eye" observation, opens the door to the use of existing technology to aid in surveillance of homes and curtilage.

Once a particular search is deemed permissible, enhancement of the naked eye has likewise been determined permissible.[39] If the focus is on the platform of the search, as opposed to the legitimate privacy interests affected thereby, the use of sophisticated technical tools to assist in a search from an alleged lawful vantage point becomes a frightening prospect.

Attempting to distinguish which surveillance equipment is constitutionally permissible becomes an exercise in futility. Items that were considered sophisticated twenty (20) years ago are commonplace today. Likewise, technology rarely used today because of its sophistication may be widely used twenty (20) years from now. As more sophisticated visual and audio eavesdropping technology becomes increasingly used, privacy rights decrease and the courts will have grave difficulty in attempting to draw what may be ever changing-lines.

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[38] Brief of Petitioner at 23.

[39] *Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952); *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

Consideration of these factors lead to the present-day Fourth Amendment analysis. Technological threats to the privacy interests which society has long valued have not changed. Consequently, Fourth Amendment analysis should not deviate from the consideration of those privacy interests.

C. Florida's proposed rule allowing aerial surveillance as long as made from a lawful vantage point is not a bright-line rule.

Assuming Florida believes a helicopter is in a place it has a legal right to be as long as F.A.A. regulations are not violated, (a theory Respondent does not in any way adhere to), judicial attempts to determine whether these regulations are complied with will have to consider factors such as terrain, presence of neighboring structures and their distance from each other, weather conditions, skills of a pilot and even the unique maneuverability of a particular model aircraft. Under F.A.A. regulations, what may be safe operation in one situation may be unsafe in another. Surely such considerations cannot be said to form legitimate Fourth Amendment boundaries. Florida's bright-line rule thus becomes a case-by-case approach that has absolutely no reasonable relationship to justifiable Fourth Amendment privacy rights.

D. The warrantless aerial observation of the interior of Riley's greenhouse cannot be justified by reference to a "war on drugs".

Though Florida's brief, in its introduction, pays lip service to the above comment, interspersed through its argument are references to combatting crime (brief of Petitioner at 26); "The degree to which we must surrender in the war on drugs" (brief of Petitioner at 27); "A state like Florida awash in illegal drugs" (brief of Petitioner at 27); and insinuations this case involves "marijuana production for profit" (brief of Petitioner at 36). First, there is no evidence this case involves marijuana production for profit; second, the Fourth Amendment makes no distinction between types of criminal offenses.[40] As stated in *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), "Those suspected of drug offenses are no less entitled to protection than those suspected of non-drug offenses." 468 U.S. at 717, 104 S.Ct. at 3304.

Such references to law and order passions are not relevant to constitutional protections. Respondent is not unmindful of attempts to balance societal values of privacy within and about the home with legitimate needs of constitutional law enforcement; but even attempting to place such reference in that context, they are but empty phrases. The plain fact of the matter; a decision by this court recognizing the personal and societal values of privacy within the home and curtilage, would have a

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[40] *Katz, supra*, 389 U.S. 347 at 360, 88 S.Ct. 507 at 516 (1967) (J. Douglas concurring)

negligible effect on the use of helicopters for effective law enforcement. A ruling reaffirming the standards of *Katz, Oliver*, and *Ciraolo* acknowledges the sanctity of the home or curtilage and recognizes the constitutional ramifications of low flying helicopters conducting surveillance on private activities within those areas. Requiring citizens to take only reasonable precautions to insure their privacy interests, will have absolutely *no* adverse effect on law enforcement's use of helicopters when: (a) involved in the hot pursuit of fleeing felons; (b) when conducting surveillance of open fields; and, (c) when observing activities or objects knowingly exposed to areas or altitudes in which the public normally travels. There is no evidence that this is one of a growing number of greenhouse cases, nor that backyard or greenhouse marijuana growing is anyway near as significant as large open field marijuana production.[41]

The decision in this case would have little effect on legitimate helicopter use by law enforcement but will significantly determine the extent all citizens will continue to enjoy personal and societal privacy protections within their homes and yards.

Warrantless aerial surveillance from an altitude or area not generally used for air travel by the public, of private homes and curtilages in which privacy expectations have been manifested is violative of the Fourth Amendment.

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[41] Of the fifty-two (52) aircraft cases cited by Petitioner (brief of Petitioner at 22 and 23), only five (5) involve greenhouse-type structures and approximately thirty-nine (39) entail surveillance of open fields as opposed to private residences or their curtilage.

By retreating into their homes, and by building roofs on structures within the curtilage of their homes, individuals manifest privacy expectation from aerial observation. To prohibit government surveillance of activities occurring within those private areas not exposed to the general public, will have the effect of affirming a free society's fundamental privacy rights associated with the sanctity of an individual's home.

◆

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I. INTRODUCTION.

A. Florida's Bright-Line Test.

Respondent Riley and supporting amici curiae contend Florida's proposed test for constitutional warrantless aerial surveillance (valid so long as the aircraft is operated where it lawfully may be) is not a bright-line because the right to pilot an aircraft at specific heights is always subject to safety considerations. They also suggest that low level helicopter surveillance is dangerous and has a "potential" for "disturbance" or "intrusion." Br. for Respondent at 32.

These contentions mask the very simplicity of Florida's suggested rule. All Florida asks is that aircraft making police aerial observations be permitted to do the same things all other like aircraft may do. Florida asks simply that such pilots be permitted to go where applicable statutes and regulations (adopted without reference to police surveillance) say they may go. As to helicopters, this means at any height they may fly with safety to the aircraft and the ground.

B. The Arguments of Respondent and Supporting Amici.[1]

Respondent Riley's Position.

Riley argues that the facts in the record are other than as portrayed by Florida in its initial brief on the merits and his case is factually distinguishable from this Court's recent decision upholding warrantless aerial surveillance, California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("Ciraolo").[2]

The former assertion is belied by the record itself (see II, infra). As for the latter assertion, no factual differences warrant a different result than this Court reached in Ciraolo.

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[1] None of the parties or amici curiae has sought to defend the dual rationale (the "non-navigable airspace"/"targeted patrol" holding) of the decision below on its own terms.

[2] Riley told the Florida Supreme Court the facts in his case and Mr. Ciraolo's were "very similar." Brief of Petitioner [Riley] (at 6), Riley v. State, 511 So.2d 282 (Fla. 1987), quoted in Petitioner's [Florida's] Br. on the Merits at 35 n. 31.

Riley contends (i) he demonstrated a subjective expectation of privacy and (ii) society should recognize that expectation as legitimate, *i.e.*, objectively reasonable, under the "*Katz* test" of a "search" under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("*Katz*"). Although Riley discusses the "second prong" of that test at length, Riley simply assumes the first prong as a given.

Florida and Riley, the *parties*, do (i) agree on the fundamental test, as capsulized in Justice Harlan's concurrence in *Katz* (389 U.S. at 360, 88 S.Ct. at 516, 19 L.Ed.2d at 587), and (ii) agree that *Ciraolo* explicitly applied that test to warrantless aerial surveillance. The *parties* disagree as to whether the decision below

properly followed *Ciraolo* in applying the *Katz* test to the warrantless naked eye helicopter observation here of the contents of Riley's greenhouse.

Positions of *Amici Curiae* Seeking Affirmance: NACDL, CACJ, CLMP, COVER, and ACLU.

In contrast to Riley's fact-specific arguments under *Ciraolo*, but like a number of law review commentators, various *amici curiae* supporting affirmance simply reject *Ciraolo* and counsel either its *de facto* circumvention or its outright overruling. They argue explicitly either that:

(i) this Court wrongly decided *Ciraolo* (the central argument of the National Association of Criminal Defense Lawyers ("NACDL"));[3] or

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[3] According to NACDL (NACDL Br. at 11), "*Ciraolo*'s reliance on public navigable airspace and the 'physically non-intrusive' manner in which the search visited upon Ciraolo (and upon Riley) was conducted is (continued...)

(ii) helicopters are so fundamentally more intrusive of privacy than airplanes that Ciraolo ought not control here (the arguments of California Attorneys for Criminal Justice ("CACJ") and Civil Liberties Monitoring Project ("CLMP")[4] and Community Outreach to Vietnam Era Returnees, Inc. ("COVER"));[5] or

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[3] (...continued) in direct derogation of Katz, and should for that reason be abandoned."

[4] CACJ and CLMP (CACJ/CLMP Br. at 11) propose a bright-line "bubble": "Amici thus propose a bright-line rule that would prohibit all warrantless helicopter surveillance of the curtilage undertaken from within a hemisphere extending 500 feet from the outer circumference of the curtilage of any residence."

[5] COVER (COVER Br. at 3 passim) proposes a bright-line similar to the one proposed by CACJ and CLMP: "Warrantless Surveillance of Homes at Altitudes Below Five Hundred Feet Violates Core Fourth Amendment Protections." (Argument caption).

(iii) the asserted presence of curtilage, which they find in Riley's "greenhouse," ought to make an outcome-determinative difference (principally, the argument of the American Civil Liberties Union et al. ("ACLU"))[6] -- a proposition already rejected by Ciraolo.

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[6] ACLU, rather unlike CACJ, CLMP, and COVER, rejects bright-lines and does not apparently propose any altitude-based alternatives of its own. Instead, ACLU seems to say if curtilage is the subject, no aerial view is constitutional.

All these *amici* rely on "*NORML*"[7/] for inspiration, if not doctrine.[8/]

[7/] "NORML" stands for National Organization for Reform of Marijuana Laws. "*NORML*" was a class action brought by NORML against federal and California state and local law enforcement officials. *See* *NORML v. Mullen*, 608 F. Supp. 945 (N.D. Cal. 1985), *remanded for consideration of subsequent authority*, 796 F.2d 276 (9th Cir. 1986), *order modifying Paragraph 3 of the preliminary injunction entered* (N.D. Cal. Sept. 16, 1986) (No. C-83-4037-RPA) (unreported), *consent decree entered* (N.D. Cal Dec. 18, 1987) (unreported) (the "Consent Decree"). *See generally* *NORML v. Mullen*, 112 F.R.D. 120 (N.D. Cal. [Sept. 8,] 1986) (order of reference to master), *petition for writ of mandamus denied*, 828 F.2d 536 (9th Cir. 1987).

[8/] CACJ and CLMP (whose counsel of record in this Court was NORML's counsel in *NORML*) devote almost all their brief to selective quotation of the Consent Decree in *NORML*, *supra*, but attach no portion of the documents referred to, many of which are not published. They claim the approval by the federal government (executive branch) of the U.S. Attorney entering into the Consent Decree in *NORML* (imposing the bright-line "bubble" described in note 4, *supra*) "is extremely significant, and lends support to our [CACJ/CLMP] 'bright-line' proposal." CACJ/CLMP Br. at 13 n. 4. Justice Department officials routinely review consent decrees in class actions in which the United States (continued...)

In Florida's view, NACDL's approach is intellectually honest, but mistaken. By contrast, the arguments of CACJ, CLMP, COVER, and ACLU are not principled, since they, like the decision below, purport to follow *Ciraolo* while rejecting its tenets.

II. A REVIEW OF THE RECORD SHOWS THAT FLORIDA'S FACTUAL STATEMENTS ARE ACCURATE AND RILEY'S CONTENTIONS TO THE CONTRARY ARE NOT.

Although the facts are simple and straightforward, Riley purports to disagree with Florida's portrayal of the record. Br. for Respondent at 8-9. Riley's

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[8/] (...continued)
is a party defendant. Further, the *NORML* Consent Decree contains all the standard disclaimers and recites all defendants' express *denial* of any violations of any provision of the United States and California Constitutions and laws (Consent Decree, II (A) (General Provisions at 6)).

disagreements with Florida's Statement of the Case are not well taken.[9]

Altitude of Florida's Helicopter. Contrary to Riley's unsupported assertion, there is no evidence the police helicopter here flew below 400 feet altitude.[10]

Towering Marijuana Plants. Riley guesses as to the likely height ("8-feet high") of the greenhouse and the number of the total 44 marijuana plants near that height. The photographic evidence supports Florida's quotation of the prosecutor's description of the height ("6-12 feet") of the marijuana plants.

The Gaping Holes in Riley's Greenhouse Roof. Riley asserts there is "no evidence the holes in the roof [of his greenhouse] were caused by [his] 'conscious act'. . . ." But he testified he built the greenhouse (J.A. 47-48) and he ignores the trial court's finding the two openings in the roof "appear to be caused by either removing or not installing two of the corrugated roofing panels," (J.A. 93-94) with the "purpose of the opening in the roof [being] to admit sunlight . . . and possibly permit circulation of air." J.A. 96. These facts fully support Florida's inference that the openings were "apparently. . . caused by the conscious act of 'removing or installing' part of the roof."[11]

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[9] Riley also treats assumptions of the court below as "facts." E.g., Br. for Respondent at 5 ("The [Florida Supreme C]ourt determined the contents of Riley's greenhouse were not exposed to the public flying in public navigable airspace. . . ."). He also relies on that court's descriptions of helicopters and what the public flying in public navigable airspace could see (e.g., id. at 16), which assertions were not based on the record. Petitioner's Br. at 8-9.

[10] Cf. J.A. 113 n.1 ("evidence was unclear"). Of course, Florida contends the specific height of flight is irrelevant so long as it was lawful.

[11] Petitioner's Br. at 7, c. Florida does not claim that Riley personally removed (continued...)

In any case, Riley does not claim he was unaware that ten percent of the top of the greenhouse was exposed, nor that two sides of the "greenhouse" were open and exposed to the sky, wind, and elements.

Evidence of Intent to Conceal Contents from Ground, but Not Aerial, Views. Riley claims there is an "abundance of direct evidence" of Riley's intent to conceal the contents of his greenhouse. But Riley did not testify at all as to his subjective intent to conceal. And the only direct evidence of a subjective actual intent to conceal the marijuana cultivating operations was a "DO NOT ENTER" sign posted in front of the mobile home.[12] The sign and the physical attributes of the property, even

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[11] (...continued) or failed to install the missing panels, although the record certainly supports that inference.

[12] Petitioner's Br. at 7(e).

if they show intent to conceal the marijuana plants from ground observations, tell one nothing of Riley's intent to conceal that marijuana from aerial observation. All objective physical manifestations of Riley's supposed intent show exposure of the contents of the greenhouse to observations from the air, not their concealment from such observations. The photographic evidence dramatically confirms this. To claim that Riley did not "knowingly expose" (Riley's words)[13] the contents thereof on those facts is to deny reality.

Inferences to Be Drawn from the Evidence: No Reasonable Efforts to Conceal. Riley proceeds as if his burden is met simply by having convinced the trial court that "the purpose of the opening in the roof was not to allow a viewing of the contents. . . .," J.A. 96, quoted in J.A. 103 (emphasis added), but was instead for improvement of marijuana growing conditions. Id. In effect, Riley argues he or any other marijuana manufacturer exhibits an adequate expectation of privacy (subjective and objective) so long as he or she does not purposefully expose the contents of his greenhouse to police aerial observation.

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[13] Br. for Respondent at 10, 22, 23.

"A Room with a View": Helicopters Versus Airplanes as Aerial Platforms. Riley joins the Florida Supreme Court in its extra-record and baseless assumption that what was seen here from a helicopter, could not "as easily" be seen here from an airplane.[14] As with the court below, aspersions are cast on helicopter observation, with no record basis.

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[14] Compare Petitioner's Br. at 9(i)(4), with Br. for Respondent at 8-9, b(9)(d).

Business Use of the Property.

a. The "Distribution" Strawman. Riley purports to disagree with Florida's Statement of the Case by saying "[t]here are no facts indicating Riley was . . . involved in the distribution of marijuana. . . ."[15] The simple response is that Florida did not, in its information or its brief, claim to the contrary.[16]

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[15] Br. for Respondent at 9(e).

[16] As stated in Petitioner's Br. (at 9, 14), Riley was charged with "the unlawful manufacture and possession of marijuana." See J.A. 3-6. See Florida Comprehensive Drug Abuse Prevention and Control Act, Ch. 893, Fla. Stat. (1983). There is no allegation in the information (J.A. 3-6) that Riley is a "distributor," meaning a person who "distribute[s]," meaning a person who "deliver[s] . . . a controlled substance," meaning "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." §§ 893.02(4) & 893.02(6)-(7), Fla. Stat. (1983), as renumbered, § 893.02(5) & 893.02(7)-(8), Fla. Stat. (1987).

b. "Manufacture."[17] Riley asserts the record does not show "Riley was in any way involved . . . in any business venture involving any illicit drugs."[18] The record facts, set forth in Florida's initial brief, speak for themselves.[19] The inference of a business enterprise from these facts is legitimate.

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[17] By statute, "'Manufacture' means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance. . . ." § 893.02(11)(a), Fla. Stat. (1983), as renumbered, § 893.02(12)(a), Fla. Stat. (1987).

[18] Br. for Respondent at 9(e).

[19] See Petitioner's Br. at 35-36. ("Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business." (emphasis added)).

III. ALTHOUGH CONCEPTS OF CURTILAGE HAVE LITTLE RELEVANCE TO NAKED-EYE AERIAL OBSERVATIONS, SUBSTANTIAL DOUBT AS TO THE EXISTENCE OF CURTILAGE REMAINS.

Florida believes the claimed status of Riley's greenhouse as curtilage is irrelevant under Ciraolo, because its contents were readily and plainly visible from the air. But Florida also continues to harbor grave doubt as to the characterization of the greenhouse as curtilage.[20]

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[20] Respondent and supporting amici are eager to cling to the mantle of curtilage, an 18th century common law property concept, whose updated contours for Fourth Amendment purposes are defined by United States v. Dunn, ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), reh'g denied, ___ U.S. ___, 107 S.Ct. 1913, 95 L.Ed.2d 519, on remand, 817 F.2d 18 (5th Cir. 1987) (per curiam) (mem.), but an ancient property concept nonetheless designed to protect truly domestic, intimate, familial activities. In the face of Florida's questioning of curtilage, Riley and the amici speak neither to the present nor the past, for when it comes to curtilage, they know that concept was never designed to make manufacturing facilities private. E.g., Dunn, supra, ___ U.S. ___, ___, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring).

In addition, Florida's separate, but related, inference that Riley lived on business premises, if accepted, might moot the question of curtilage altogether. See Dunn.

Riley was charged with conduct of a "manufactur[ing]" (i.e., cultivating) operation, which Florida submits can reasonably be inferred to have been a business enterprise.[21] Nobody expects Riley to confirm this inference, by freely testifying as to a criminal business purpose. Likewise, nobody should expect police in a helicopter to debate among themselves whether somebody's exposed marijuana lies in a paradigmatic Blackstonian curtilage before they may look at it. At a minimum, Florida submits the concentration of Respondent on curtilage is misdirected.

IV. THERE IS NO EVIDENCE RILEY HAD A SUBJECTIVE EXPECTATION OF PRIVACY FROM WARRANTLESS NAKED-EYE AERIAL OBSERVATION FROM A LAWFUL PUBLIC VANTAGE POINT.

Florida maintains Riley failed to demonstrate a subjective expectation of privacy (in the contents of his greenhouse) from warrantless naked eye aerial observation from a lawful public vantage point.[22] Florida believes that Katz requires Riley to prove his subjective expectation. Riley apparently contends this Court should simply assume it.

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[21] Whether Riley was engaged in a business enterprise under Florida criminal law, or for federal income tax purposes, is not the issue under Dunn. Further, that Riley was not charged with "distribution" hardly transforms his "manufacturing" of illegal drugs into an intimate activity of the home. In Florida's view, even assuming the mobile home here constituted a residential dwelling, it does not follow the greenhouse was curtilage.

[22] See Petitioner's Br. at 18 & n. 10. The court below denied Florida's motion for rehearing on this very point without explanation. J.A. 141-43, denied, J.A. 154.

A. Ciraolo Reserved The Question of Defendant Ciraolo's Subjective Expectation of Privacy With Respect To Aerial Observation of His Curtilage.

In Ciraolo the lower court's determination that Mr. Ciraolo had a subjective expectation of privacy was not challenged by the state. This Court emphasized this, but nonetheless expressed doubt as to the adequacy of the showing of subjective expectation:

(i) "However, we need not address that [subjective expectation of privacy] issue, for the State [of California] has not challenged the finding of the California Court of Appeal that respondent had such an expectation."[23/]

[23/] Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1811-12, 90 L.Ed.2d at 215 (emphasis and brackets added).

(ii) "It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street level views."[24/]

(iii) "So far as normal sidewalk traffic was concerned, this fence served that purpose, because respondent 'took normal precautions to maintain his privacy.'"[25/]

(iv) "Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus."[26/]

(v) "Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe

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[24/] Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1812, 90 L.Ed.2d at 215 (emphasis added).

[25/] Id. (case citation omitted and emphasis added).

[26/] Id. (emphasis added).

his unlawful gardening pursuits, is not entirely clear in these circumstances."[27]

Florida does challenge the conclusion that Riley had an actual expectation of privacy from aerial observation. Further, Florida does express grave doubt as to the conclusion that the greenhouse was curtilage. Thus the "first prong" question reserved in Ciraolo is squarely presented here.

B. Riley Ignores the Ciraolo Qualifiers and Disclaimers and Offers No Meaningful Response to Florida's "No Subjective Expectation" Argument.

Rather than explain how he manifested an actual expectation of privacy from aerial (as opposed to ground) observation, Riley makes the naked assertion the courts below "justifiably" determined just that. He

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[27] Id. (emphasis in original), quoted in Petitioner's Br. at 18 n. 10.

never shows the basis of that asserted determination. Riley really wishes this Court, as compliance with the first prong of the Katz test, to accept "that few criminals subjectively desire their acts to be detected."[28]

C. The First Prong of the Katz Test and the Ciraolo Qualifiers and Disclaimers Must Be Taken Seriously.

Contrary to Riley and the decision below, the first prong of the Katz test was real to its author, Justice Harlan, and, Florida submits, remains real today under Ciraolo. If Riley fails to meet the first prong, he has no right to a determination whether he meets the second prong. Riley must show he actually intended the roof and sides of his greenhouse[29] would conceal the marijuana from aerial view.[30]

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[28] E.g., Note, Warrantless Aerial Surveillance: A New Dimension, 16 Lincoln L.Rev. 199, 200 (1986) [published 1988] ("Lincoln Note") (citing Granberg, Is Warrantless Aerial Surveillance Constitutional?, 55 Cal. S.B.J. 451 (Nov. 1980)).

Whatever Riley's subjective expectation of privacy from ground level observation, Ciraolo teaches that a subjective expectation of privacy from aerial observation may be different. The law reviews have read Ciraolo as does Florida. Ciraolo's critics

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[29] Moreover, since Riley disclaims the acts of roof panel removal, or failure to install, are "conscious" -- or even his -- it is not entirely clear how Riley can claim to have built anything for purposes of concealment. Certainly Riley has no pretense of domestic usage equivalent to that of Mr. Ciraolo.

[30] The Florida Supreme Court also seemed to equate a curtilage holding with a subjective expectation holding and, paradoxically, to predicate that equation on Ciraolo itself. See J.A. 118 (quoting 476 U.S. at 211, 106 S.Ct. at 1811, 90 L.Ed.2d at 215). Certainly Riley may attempt to argue his greenhouse was curtilage and that impacts his actual expectations (particularly as to street level observation), but the issue, contrary to Riley and the court below, is expectations, not curtilage.

acknowledge that "decision was reached by application of the Katz standard." Lincoln Note, supra, at 206. The manifestation of subjective intent may be different with respect to ground and aerial observations.[31]

Florida submits that the partially uncovered roof and the exposed sides disprove any subjective intent to conceal from aerial observation and therefore Riley failed the first prong of Katz.

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[31] "In this [Ciraolo] case, therefore, it was found not to be clear if the defendant had manifested an [actual, subjective] expectation of privacy from all observations of his backyard." Lincoln Note, supra, at 206. (emphasis in original and brackets added). See also Petitioner's Br. at 18 n. 10.

V. EVEN ASSUMING RILEY HAD A SUBJECTIVE EXPECTATION OF PRIVACY FROM AERIAL OBSERVATION AND FURTHER THAT HIS GREENHOUSE WERE CURTILAGE, RILEY COULD HAVE HAD NO OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY FROM WARRANTLESS NAKED-EYE AERIAL OBSERVATION FROM A LAWFUL PUBLIC VANTAGE POINT.

A. Riley Misreads Ciraolo.

Even if Riley satisfied the first prong of Katz, he fails to satisfy the second prong that he had an objectively reasonable expectation of privacy from warrantless naked eye aerial observation from a lawful vantage point. Ciraolo compels that conclusion.

This Court recently observed:

> Similarly, we held in California v. Ciraolo, supra, that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S., at 213 - 214, 106 S.Ct., at 1813.

California v. Greenwood, ___ U.S. ___, ___, 108 S.Ct. 1625, 1629, 100 L.Ed.2d 30, 37 (1988) (emphasis added).

Justices Brennan and Marshall, who dissented in Ciraolo and Dow[32] and Greenwood, nevertheless stated:

> [When persons or animals] actually ...expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," ante, [___ U.S., at ___, 108 S.Ct.,] at 1629. That much follows from cases like . . . California v. Ciraolo, 476 U.S. 207, 213-214, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210 (1986) (emphasis added), which held the Fourth Amendment does not prohibit police from observing what "[a]ny member of the public flying in

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[32] Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

this airspace who glanced down could have seen."[33]

B. Despite the Requests of One Amicus to Overrule Ciraolo and Respondent and Other Amici to Interpret It Away, Ciraolo Was Correctly Decided and Controls the Result Here.

1. What Is Knowingly Exposed To The Naked-Eye May Lawfully Be Viewed.

Assuming Riley did evince an actual, subjective expectation of privacy from public or police aerial observation, this Court should squarely hold Riley's expectation is not one society is prepared to recognize as objectively reasonable (i.e., legitimate). This is not just the rule of Ciraolo and Dow, supra. Both these decisions follow from the larger teaching

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[33] California v. Greenwood, supra, ___ U.S. at ___, ___, 108 S.Ct. at 1631, 1636, 100 L.Ed.2d at 40, 45 (Brennan, J., joined by Marshall, J., dissenting) (emphasis in original) (emphasis to Ciraolo quotation added by Justice Brennan as indicated) (brackets added).

of United States v. Knotts, 460 U.S. 276, 103 S.Ct 1081, 75 L.Ed.2d 55 (1983).

Nor would a conclusion that Riley's greenhouse was curtilage change the result. Although the presence of curtilage may effectively mean heightened Fourth Amendment privacy protection (because curtilage can connote a person's heightened expectation of privacy), nothing in Katz or Ciraolo or traditional curtilage doctrine holds that what can be seen exposed therein by the naked eye requires a warrant.

2. Neither Ciraolo Nor Any Appropriate Lawful Vantage Point Test Turns On Any Reference To "Navigable Airspace."

NACDL faults Ciraolo for using "navigable airspace" as a wooden, mechanical "horizontal property line in the sky." NACDL Br. at 11. NACDL is wrong; Ciraolo draws no property or boundary lines in the sky; it simply asks whether the vantage point was lawful by asking, in that case, whether the aircraft was where it could be. Nor do any of this Court's Justices appear to read Ciraolo as "navigable airspace" decisions either. Their descriptions of Ciraolo in California v. Greenwood, supra, do not employ the phrase, "navigable airspace."[34] Nor does Ciraolo cite to FAA aircraft altitude and safety regulations. Ciraolo is quintessentially a "lawful public vantage point" "plain view" case. Florida's proposed test is phrased in similar terms. Florida looks, for all aircraft, to the "lawful public vantage point" endorsed by Ciraolo and Dow.

Of course, where aircraft may lawfully fly is subject to change. If tomorrow, Congress forbade aircraft to fly below 5,000 feet (either to enhance privacy or for any other valid purpose), Florida would

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[34] See, text, pp. 26-28, supra.

accept that people on the ground would have a legitimate expectation of privacy from aerial observation made from a point below that aerial floor. People, whether innocent or criminal, would then be presumed to know that police planes and helicopters could not legally fly below that altitude, and consequently such legitimate expectation would define the foreseeable "floor" for lawful police aerial vantage points for Fourth Amendment warrantless aerial observation.

Florida has never asserted the Fourth Amendment is controlled by any statute or regulation. Rather, Florida has observed the statute or regulation may condition all persons' expectations. The rule proposed by Florida meets the expectation of the pilot, who is trained to know the rules of lawful flight for all purposes, including aerial observation. It also meets the expectation of the person on the ground, in calculating what is likely to remain private. And, of course, it is practical for the judiciary to administer.

C. Warrantless Naked-Eye Aerial Surveillance From A Lawful Public Vantage Point Is Clearly Permissible Even If The Area Viewed Is Curtilage.

This Court has long held that unaided police observations from a lawful public vantage point do not constitute a search.[35] The latest round of law review commentaries -- published and indexed since Florida's initial brief on the merits -- recognize there is a world of difference between naked-eye police aerial observations and technological augmentation of the human senses.[36]

Current academic thinking would place the Fourth Amendment battleground in technological augmentation of the senses, not in the mundane and relatively settled realm of naked-eye aerial observation:

> [A] careful definition of when the use of technology by police constitutes a search will provide the solution: A search is the use of technology to augment the senses in order to obtain information that could not have otherwise been obtained from a lawful public vantage point without such an augmentation. In other words, it is not a "search" to use technology to augment the senses in order to obtain information that would be otherwise obtainable from a lawful vantage point without the aid of sensory augmenting devices.[37]

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[35] United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), followed in Ciraolo, supra.

[36] E.g., Comment, Law Enforcement Use of High Technology: Does Closing the Door Matter Anymore?, 24 Cal. W. L. Rev. 83 (1988) ("Cal. W. Comment").

[37] Cal. W. Comment, supra, at 94. See generally id. 88-90 & n. 60.

The academic commentators also recognize -- unlike Riley, the amici, and the decision below -- that the existence of curtilage does not change the calculus:

> Both the Dow and Ciraolo courts reiterated the notion that the curtilage is an area in which privacy expectations are reasonable. However, the [F]ourth [A]mendment now protects those expectations only when the government physically intrudes on the curtilage and when the government's surveillance equipment is too technologically advanced.[38]

Consistent with Katz, Ciraolo recognizes that an area's status as curtilage will not trigger any warrant requirement where

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[38] Note, Technology Encroaches on the Reasonable Expectation of Privacy: Dow Chemical Co. v. United States, 17 N.M.L. Rev. 391, 408 (Spr. 1987) [published 1988] (emphasis added). See generally, Note, The Open Fields Doctrine as Applied to Aerial Photography: Dow Chemical Co. v. United States, 21 Suffolk L. Rev. 256 (Spr. 1987) [published 1988]. One can see and hear the helicopter. Cf. J.M. Granham, Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches, 64 U. Det. L. Rev. 687 (Sum. 1987) [published 1988].

no physical intrusion is involved. An aerial view of curtilage would not constitute a search if what can be seen by the police from the air could be lawfully seen by an ordinary member of the flying public at the same altitude.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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No. 87-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA
Petitioner

vs.

MICHAEL A. RILEY
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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IN THE

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STATE OF FLORIDA
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Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF AMICUS CURIAE OF AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC.

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Parker D. Thomson, Esq., Special Assistant Attorney General, State of Florida, Counsel for the Petitioner, and Marc H. Salton, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. (ALEA) is a professional service organization and is incorporated as a not-for-profit public benefit California corporation. The association has over 1,300 professional members, who are full-time law enforcement pilots or flight support personnel. The association sponsors an annual national training conference, and six regional aircraft safety and air operations seminars each year. Its bimonthly magazine, *Air Beat,* is dedicated to the safe utilization of aircraft for law enforcement purposes, and features various articles on aircraft technology.

Amicus' interest in the instant case arises from our concern that the decision of the court below will unduly hamper the crucial efforts of local, state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops. As will be demonstrated, aerial surveillance, particularly with the use of helicopters, is the only effective means at the disposal of law enforcement agencies to counter the ever growing problem of illegal domestic marijuana cultivation. We ask this Court to reverse the decision of the Florida Supreme Court in *Riley vs. State of Florida,* 511 So 2d 272 (1987), where the court held that the protection of the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the Florida Constitution with a reasonable expectation of privacy of activities inside a greenhouse would remain private and out of view of aerial observers. We believe that the Florida high court failed to properly apply this Courts recent holding in *United States vs. Dunn,* 107 S.Ct. 1134, 94 L.Ed. 2d 326, rehearing denied, 107 S.Ct. 1913, 95 L. Ed 2d 519, on remand 817 F.2d 18 (1987) on the issue of what does or does not constitute curtilage and refused to recognize that the sighting of marijuana with the naked eye from a vantage point in the air in which a helicopter had a legal right to be, done in a physically non-intrusive manner did not violate a Fourth Amendment right and therefore no warrant was required before conducting the overflight.

ARGUMENT

I

EFFECTIVE LAW ENFORCEMENT REQUIRES A RULING BY THIS COURT THAT A WARRANTLESS NAKED-EYE AERIAL OBSERVATION OF THE HOME'S CURTILAGE DOES NOT VIOLATE THE FOURTH AMENDMENT

Amicus will not restate to any significant degree the legal arguments developed and presented by the State of Florida in this case. We are in complete agreement with those arguments and wish to discuss important public policy questions raised by the issues in this case, and their importance to the future of airborne law enforcement, particularly, the war against drugs in our society.

The structure which is the subject of this case is a two sided make shift greenhouse from which 44 marijuana plants were seized and was observed by a police officer from a helicopter at approximately 400 feet was described by the trial court as an "outbuilding" located approximately 10 to 20 feet to the rear of the mobile home residence. The structure was enclosed on only two sides and the remaining sides were exposed. The roof was constructed of corrugated roofing. A portion of the roof was translucent and a portion was opaque. Two openings in the roof constituted approximately one tenth of the total roof area. The structure and residence were located on five acres in a rural area.

The Florida Supreme Court concluded that the structure was part of the curtilage and that the respondent Riley exhibited a subjective expectation of privacy in the structure and its contents. This conclusion was based upon the following factors: the opaque portions of the sides and roof, the wire net fence surrounding the five acres and a "DO NOT ENTER" sign posted in front of the mobile home. These facts, the Florida court held, show Riley's subjective expectation that the interior of the structure would remain shielded from earthbound and aerial observation. That conclusion was made without regard to this Court's opinion in *United States v. Dunn,* _____ U.S. _____, 107 S. Ct. 1134 (1987), decided four months prior to the Riley decision and which enumerated four factors to be considered in determining whether a structure should be considered part of the curtilage.

Amicus submits that the application of the four factors announced in *Dunn* would mandate the finding that the structure should not be considered part of the curtilage. The first factor, the proximity of the structure to the home, is not solely determinative. Here, the structure is ten to twenty feet behind the home. Although, not attached to the residence, the structure cannot be said to be so excessively distant from the home as to be outside the curtilage in a rural area. The other factors must then be considered.

Secondly, although the structure is included within an enclosure surrounding the home, the fence in this case is a perimeter fence surrounding the entire five acres. The residence and out-building were not enclosed by an interior fence which set them apart from the remaining acreage.

The third factor, the nature of the uses to which the area is put, was not addressed by the Florida Supreme Court. Nothing in the photographs admitted into evidence at the suppression hearing or the testimony of Riley or of the police officer suggested that the out-building was used for those "intimate activities of the home" referred to in *Dunn*. Instead, the structure was clearly used for agricultural purposes and its exposed side and roof were intended to facilitate agricultural activity.

Finally, the steps taken by the resident to protect the out-building from observation by outsiders is minimal. The "DO NOT ENTER" sign is more of a warning to potential trespassers than an attempt to conceal the contents o fthe structure from view. The wire net fence surrounding the property is, likewise, more intended to demark the property line than to prevent observation of the inside area. As this Court observed in *Dunn,* the interior ranch style fences were intended to corral livestock, not to prevent persons from observing what lay inside the enclosed area. Here, the wire net fence did not obscure any view from outside the property.

The holdings of this Court in *Oliver v. United States,* 466 U.S. 170 (1984) and *Dow Chemical Co. v. United States* _______ U.S. _______, 106 S.Ct. 1819 (1986) have made it clear that the Fourth Amendment does not protect open fields from warrantless governmental intrusion. In *Oliver,* this Court reaffirmed the holding of *Hester v. United States,* 265 U.S. 57 (1924), that a person may not legitimately expect privacy for those activities conducted outside except in the area immediately surrounding the home. *Oliver* further permitted a trespass upon open fields as there is no societal interest in protecting activities which occur in areas which are not considered curtilage. As stated in *Oliver:*

> "The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver,* 466 U.S. at 182-183.

To fall within the open fields doctrine the area "need be neither 'open nor a field' as those terms are used in common speech." *Oliver* at 180, n.11. Amicus submits that in this case, there is a lack of evidence to support the Florida Court's finding that the out-building used to cultivate marijuana should be considered part of the curtilage or that the aerial observation by the deputy infringed upon a personal and societal value protected by the Fourth Amendment.

The Ninth Circuit Court of Appeals dealt with a similar case in *United States v. Broadhurst,* 805 F.2d 849 (9th Cir. 1986). Although, that case involved aerial surveillance from a fixed wing aircraft at an altitude of not less that 1000 feet, the aircraft repeatedly circled a greenhouse in order to permit viewing of the contents from various angles through the sides of the greenhouse. Nothing was observable through the roof but through the sides, the officers could discern shadows, shapes of plants and shades of green which were consistent with marijuana. The greenhouse was situated in a rural area and the property was surrounded by a barbed wire fence with "No Trespassing" signs. The Ninth Circuit held that since the defendants knowingly exposed the translucent sides of the greenhouse to view from public navigable airspace, there was no intrusion of their privacy rights:

> "What a person knowingly exposes to public view is not protected by the Fourth Amendment." *Broadhurst* at 856 citing *U.S. v. Katz,* 389 U.S. 347, 351 (1967).

Therefore, it is submitted by Amicus that the decision below from the Florida Supreme Court erroneously concluded that the out-building used as a greenhouse falls within the scope of curtilage and is therefore entitled to the protection of the Fourth Amendment from warrantless governmental intrusion.

II

AS A MATTER OF SOUND JUDICIAL POLICY THE RIGHT TO PRIVACY SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE FROM A HELICOPTER LAWFULLY OPERATING UNDER FEDERAL AVIATION REGULATIONS.

Amicus' primary focus in this case is centered on the issue of physically non-intrusive surveillance or observation from the air by police of property used to cultivate marijuana. Because the domestic growing of marijuana has reached epidemic proportions like its international counterpart, cocaine, many states and the federal government have engaged in very aggressive marijuana eradication and drug interdiction programs throughout the United States. Drug smuggling, trafficking and street sales of marijuana, and the distribution of other dangerous narcotics in this country represents a social problem that is being given the highest level of enforcement and eradication priority by the highest level of the federal government, i.e. the President and Vice President, as well as, top state law enforcement administrators.

For example, the Texas Department of Public Safety, during the years 1985 to 1987, seized over two million marijuana plants with a street value of nearly $2 billion, through an aerial surveillance program working in cooperation with the Federal Drug Enforcement Administration. Approximately 98% of those seizures were solely the result of initial aerial surveillance by helicopter operating within its authorized navigable airspace, but significantly below 1000 feet above ground level. (These facts are revealed in the letter of April 18, 1988, from Leo E. Gossett, Director, of the Texas Department of Public Safety included in the Appendix of this brief). Such domestic marijuana eradiction programs by law enforcement are essential if there is to be any significant impact on these lucrative but illegal activities.

Law enforcement officials clearly have a legitimate interest in eradicating marijuana cultivation activities. Therefore, the pertinent inquiry is whether the aerial surveillance tactics utilized were unreasonably intrusive or went beyond reasonable efforts to determine if marijuana was being grown in the area[1]. Relevant factors to consider include, among others, the total number of instances of surveillance, the frequency of surveillance. The length of each surveillance, the altitude of the aircraft, the degree of disruption of legitimate activities on the ground, and whether the flight regulations were violated by the surveillance[2]. Apply these consideration to the facts in the instant case, this Court should find no violation of the Fourth Amendment.

Flight levels are federally regulated for both fixed wing and helicopter aircraft to insure air safety within specifically defined navigable airspace[3], that is to say:

> "(29) Navigable airspace" as meaning the airspace above the minimum altitude of flight prescribed by regulation... and shall include airspace needed to insure safety in take off and landing of aircraft."[4]

Under federal rules and regulations, at all times, anywhere, aircraft must maintain an altitude which allows for emergency landing without undue hazard to persons or property on the surface in the event of a power failure[5]. The regulations further establish certain minimum altitudes for fixed winged aircraft with 1000 feet above the highest ground obstacle in congested areas[6],

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[1] *Giancola v. State of W.Va. Dept. of Public Safety* 830 F2d 547,550 (4th Cir. 1987)

[2] Id p. 551

[3] 14 CFR Part 91.79

[4] 49 USC Section 1301(29)

[5] 14 CFR Part 91.79(a)

[6] 14 CFR Part 91.79(b)

or in other than congested areas, an altitude of 500 feet above the surface, except over open water or sparsely populated areas[7]. Helicopters are exempt from either of the two federally regulated minimum flight altitudes that must be maintained by fixed winged aircraft[8]. Given the unique characteristic of a helicopter to perform "autorotation" to safely land the aircraft in the event of a power failure, such maneuver can be accomplished at almost any altitude, without danger to persons or property below, provided the aircraft has sufficient forward air speed[9].

In the instant case, the Sheriff's helicopter was flying at an altitude of 400 feet in a non-congested, rural, area of the county when the pilot and detective observed with the naked eye marijuana plants growing through openings in a greenhouse.

In a 1988 California Appellate Court case with issues that parallel the instant case before this Court, Sabraw, J. in delivering the opinion for the court noted:

> "[i]t *(Ciraolo)*[10] simply pronounced that 'the naked-eye view from navigable airspace does not offend the Fourth Amendment whatever the circumstances of the view' "[11] (parenthetical added)

---

[7] 14 CFR Part 91.79(c)

[8] 14 CFR Part 91.79(d)

[9] Hughes Tool Co., Aircraft Div., "Owners Manual for U.S. Army Primary Trainer - Hughes Model TH55A" p. 3-5d figure 3-3 (Height Velocity Diagram). The Hughes TH55A is the type aircraft used by the Pasco Co. Florida Sheriff's Office in the instant case. To insure operational safety and to be able to perform a successful autoration in an emergency, varying airspeed/altitude, combination are required, e.g. 20 kn/400', 40 kn/300', 50 kn/250'

[10] *Calif. v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L. Ed. 2d 210 (1986)

[11] *People v. Romo,* 243 Cal. Rptr. 801, 804 (Cal. App. 1st Dist. 1988), citing *People v. Sabo,* 185 Cal. App. 3d 845, 853, 230 Cal. Rptr. 170 (1986)

> "Although the *Ciraolo* Court did state that the plane was in navigable airspace, we do not read the opinion to mean that the case *only* applies to helicopters if they are flying at an altitude of 1,000 feet (emphasis added)."[12]

This Court has upheld the warrantless physically non-intrusive observation of the curtilage of a residence from an aircraft lawfully operating within public navigable airspace.[13]

Although it can be argued that an investigation on private property is certainly an inconvenience to the owner, our concept of ordered liberty requires that all individuals at one time or another give up unrestricted freedom in favor of the safety and welfare of the community. The most obvious example is what appears to be the absolute right of free speech. Despite plain language that it shall not be abridged, this right is modified and limited in many different ways.[14]

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[12] Id

[13] *Calif. v. Ciraolo*, 476 U.S. 207, ______, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210, ______ (1986)

[14] Libeu, "What is a Reasonable Expectation of Privacy" 12 W.St.U.L.Rev. 849 (1985)

CONCLUSION

Amicus respectfully submits that the decision of the Florida Supreme Court should be reversed on the facts and law, and on the basis of sound judicial policy.

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April 18, 1988

Mr. Paul J. Marino, Esq.
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Dear Mr. Marino:

Beginning with the 1985 growing season, the Texas Department of Public Safety initiated an aggressive aerial Domestic Marijuana Eradication Program supported by the Drug Enforcement Administration. The following figures show marijuana seizures and values prior to and after this task force was formed:

Task Force	Growing Seasons	Plants Seized	Street Value
Prior To	81-84	78,942	$ 67,100,700
After	85-87	2,262,334	$ 1,922,983,900

Due to it's unique flight characteristics, the helicopter is, by far, the most effective search platform. As a result, approximately 98% of our search efforts are in helicopters. The helicopter's value is that it can safely fly at relatively low altitudes and slow airspeeds in order to conduct such a search.

Our pilots fly their initial search patterns at altitudes anywhere from 400 to 1000 feet AGL. When a suspected, clandestine garden is located, the helicopter allows for a safe, lower altitude approach at about 100 to 400 feet AGL to confirm that the plants observed are in fact marijuana. We have found this low altitude capability of the helicopter to be essential to an effective eradication program.

If you need additional information concerning our eradication program, please feel free to call.

Sincerely,

Leo E. Gossett
Director

LEG:sld

No. 87-764

Supreme Court, U.S.
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APR 29 1988
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CLERK

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF FLORIDA,
Petitioner,
vs.
MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, KANSAS, KENTUCKY, MICHIGAN, MINNESOTA, MISSOURI, NEBRASKA, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WISCONSIN AND WYOMING

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QUESTION PRESENTED

Whether the ruling of the Florida Supreme Court that warrantless aerial observations, from a helicopter at an altitude of 400 feet, of a greenhouse within the curtilage of a home violates the Fourth Amendment conflicts with *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986).

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STATEMENT OF THE FACTS

In August, 1984, the Pasco County Sheriff's Office received an anonymous tip regarding marijuana growing on the Respondent's property. The Respondent rented approximately five acres of rural property on which was located a mobile home which he used as a residence. A greenhouse was ten to twenty feet behind the mobile home. Deputy Sheriff Kurt Gell conducted a ground level investigation but was unable to discern the contents of the greenhouse from the road. Consequently, Gell secured a helicopter and flew over the Respondent's property at an altitude of 400 feet. Through openings in the greenhouse's roof, Gell identified marijuana plants. Gell obtained a search warrant based on an affidavit which described the anonymous tip and the aerial observation. When Gell executed the warrant, he seized forty-four (44) marijuana plants and arrested the Respondent for the unlawful manufacture and possession of marijuana.

The trial court granted the Respondent's motion to suppress the evidence on the ground that the Respondent manifested a reasonable expectation of privacy from aerial surveillance. The Florida Court of Appeals, however, reversed the trial court's order and certified the issue to the Florida Supreme Court. The Florida Supreme Court reversed the Florida Court of Appeals and ruled that the Respondent had a reasonable expectation of privacy in the greenhouse and its contents from the aerial observations of a police officer flying in a helicopter at an altitude of 400 feet.

INTEREST OF AMICI CURIAE

Law enforcement agencies have increasingly employed aerial surveillance in order to detect illegal activities.[1] Aerial surveillance is an effective law enforcement tool in curtailing the cultivation and distribution of marijuana. Statistics on the eradication of marijuana underscore the interest of the states in this area. Law enforcement agencies in the fifty states destroyed 7,432,834 cultivated marijuana plants and 3,105,460 wild marijuana plants in 1987.[2]

When presented with the use of aerial observations by police officers, courts had been unable to establish a consistent method of analysis to determine whether warrantless aerial surveillance constituted an unreasonable search under the fourth amendment.[3] In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), however, the United States Supreme Court gave lower courts a workable guideline to follow when confronted with aerial surveillance cases. First, it must be determined whether the area observed is located within the curtilage or in an open field. *Id.* at 212-213, 106 S.Ct. at 1812. If the area searched is within the open field, the warrantless observation is valid *per se* under the reaffirmation of the open fields doctrine set forth in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984). If the area is within the curtilage, the two-part test set forth in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) must be considered: (1) whether a person exhibited an actual (subjective) expectation of privacy; (2) whether the expectation is one that society is prepared to recognize as reasonable. *Id.*[4] Applying the foregoing test to the facts in *Ciraolo*, the United States Supreme Court upheld the warrantless, physically nonintrusive observation of the curtilage of a residence from an aircraft lawfully operating within the public navigable airspace.

---

[1] In 1987, the Drug Enforcement Administration sponsored twenty-one (21) marijuana eradication seminars. Approximately 600 officers from state and federal agencies attended the seminars which included instruction on, among other things, aerial detection and photography. Also, the D.E.A. aviation unit, alone, flew 210 missions; totalling 632.1 flying hours. *See* U.S. Dept. of Justice, 1987 Domestic Cannabis Eradication Suppression Program Final Report (1987).

[2] U.S. Dept. of Justice, 1987 Domestic Cannabis Eradication Suppression Program Final Report (1987).

[3] *See* Note, The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?, 60 N.Y.U.L. Rev. 725, 739-750 (1985).

[4] "Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft of 1,000 feet violates an expectation of privacy that is reasonable." *Id.*

The Florida Supreme Court, in the instant case, ruled that the Fourth Amendment was violated since the helicopter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. The amici curiae submit that the Florida Supreme Court's interpretation of *Ciraolo* is unduly narrow. The *Ciraolo* Court cited the factor of airspace to emphasize that the plane had a right to be where it was in observing the marijuana. *Ciraolo* should not be read to apply only to helicopters flying at an altitude of 1000 feet. In *Ciraolo*, the Court examined the interests of the individual and law enforcement to determine whether a reasonable expectation of privacy existed. The standard to resolve warrantless aerial surveillance cases, enunciated in *Ciraolo*, strikes an appropriate balance between the preservation of constitutionally guaranteed privacy and legitimate law enforcement technique.

SUMMARY OF ARGUMENT

The flexible guidelines for aerial surveillance cases set forth in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986) ensures that a balance is maintained between effective law enforcement and the individual's right of privacy.

ARGUMENT

In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), the United States Supreme Court, applying the two-prong test set forth in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), upheld the warrantless, physically nonintrusive observation of the curtilage of a residence from an airplane lawfully operating within public navigable airspace. *Katz* established the reasonable expectation of privacy as the touchstone of fourth amendment analysis. *Katz* posits a two-part inquiry: (1) whether a person has exhibited an actual (subjective) expectation of privacy and (2) whether the expectation is one that society is prepared to recognize as reasonable. See *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979). In *Ciraolo*, the court conceded that Ciraolo manifested a subjective expectation of privacy from street-level observations since he had erected a ten foot fence. The court, however, questioned whether Ciraolo had a subjective expectation that his yard would not be viewed from some other vantage point.

In applying the second element of the *Katz* test, the court examined the curtilage doctrine.[5] Although Ciraolo's yard was within the curtilage of his home, the fence did not bar all observations by the police. The court opined that even though an individual manifests his expectations of privacy by taking measures to restrict some views of his activities, such measures do not prevent a police officer from making observations from a public vantage point where he has a right to be. The public vantage point in *Ciraolo* was the navigable airspace in which the officers flew to view Ciraolo's yard. The court further explained that any member of the public flying in the airspace could have observed what the officers viewed. The court concluded that because the officers viewed the curtilage from a public vantage point, their aerial observations were not protected by the fourth amendment.

The standard of review for aerial surveillance cases enunciated in *Ciraolo* properly assesses the interests of the individual and law enforcement to determine whether a reasonable expectation of privacy exists. In *Ciraolo*, the court balanced the nature of the property observed against the surveillance method employed. In evaluating the intrusiveness of the surveillance, the court considered that the police observations occurred in navigable airspace.[6] Navigable airspace is that which Congress has placed in the public domain and which is airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority. *United States v. Causby*, 328 U.S. 256, 263, 66 S.Ct. 1062, 1067 (1946). The factors of navigable airspace and altitude, however, are not the critical factors in the decision. Rather, these factors were stated to emphasize that the airplane had a right to be where it was in observing the marijuana plants. Thus, *Ciraolo* should not be read to apply only to airplanes and helicopters flying at an altitude of 1000 feet.[7] Indeed, the following language from the opinion supports this interpretation: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he had a right to be and which renders the activities clearly visible." *Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1812.

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[5] Regarding the curtilage doctrine, the court stated:

> [T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. (Citations omitted).
>
> *Ciraolo*, 476 U.S. at 212-213.

Nevertheless, it is important to note that *Ciraolo* should not be construed to mean that all helicopter overflights at 400 or 500 feet are legal. Helicopters and airplanes have different

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[6] In *Ciraolo*, the airplane flew at an altitude of 1000 feet. In congested areas, federal aviation regulations prohibit fixed-wing aircrafts from flying lower than 1000 feet above the highest obstacle. 14 C.F.R. § 91.79(b) (1986). In noncongested areas, an aircraft must be operated above an altitude of 500 feet. 14 C.F.R. § 91.79(c). Helicopters may be operated at less than the minimum altitude "if the operation is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.79(d).

[7] In the instant case, the Florida Supreme Court observed:

> Indeed, we note the care taken to qualify and limit the permissible observation to the "naked-eye" from "navigable airspace" at an "altitude of 1000 feet" in a "physically nonintrusive manner" . . . We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in the roof.

Riley v. State, Fla., 511 So.2d 282, 287 (1987).

capabilities. The helicopter, however, can conduct more intrusive-type flights. See *People v. Romo*, 198 Cal. App. 3d 581, 243 Cal. Rptr. 801 (1988). Therefore, in analyzing the reasonableness of helicopter overflights, the standard of review set forth in *Ciraolo* should be applied in conjunction with a consideration of the following factors: ". . . the total number of instances of surveillance, the frequency of surveillance, the length of each surveillance, the altitude of the aircraft, the degree of disruption of legitimate activities on the ground, and whether any flight regulations were violated by the surveillance." *Giancola v. State of W. Va. Dept. of Public Safety*, 830 F.2d 547, 550-551 (4th Cir. 1987).

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

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NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
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v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. NACDL was founded nearly three decades ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of criminal law, and to encourage integrity, independence and expertise among defense lawyers.

In California vs. Ciraolo, 476 US 207, 106 S.Ct. 1809 (1986), this Court had occasion to consider the constitutionality of the warrantless aerial search of a private home. The proliferation of such cases in recent years[1] suggests that the facts and principles of Ciraolo are of unusual topical significance to the bench and the criminal defense bar. The Florida Supreme Court had Ciraolo before it when it decided State vs. Riley, 511 So.2d 282, esp. at 284 et. seq. (Fla. 1987). Finding important factual differences between the two cases, the Florida court distinguished Ciraolo and disallowed the warrantless search in Riley.

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[1] See the extensive catalogue of cases appearing at footnotes 14 and 15 in the Brief of Petitioner, pp. 21-2.

In his brief before this Court, Respondent Riley underscores those factual distinctions and demonstrates that they justify the differing results. We leave the parsing out of factual distinctions to Respondent Riley. Our argument is purely a legal one. We seek to demonstrate herein that Ciraolo was wrong as a matter of law because its treatment of the second prong of the Katz test represents a complete and conceptually unjustified departure from settled doctrine. We argue further that Riley presents an ideal opportunity for this Court to recede from

Ciraolo and return to the mainstream of its own jurisprudence.

Petitioner and Respondent herein have consented to NACDL's participation as amicus curiae, and letters of consent have been filed with this Court. NACDL is mindful of the general rule disfavoring oral argument by amici, see Rule 38, Rules of the Supreme Court of the United States; cf. Wheeler vs. Barrera, 414 US 1140 (1974) with Train vs. City of New York, 419 US 818 (1974). Nevertheless, because of the extraordinary impact that this case will have on the development of Fourth Amendment jurisprudence, and because NACDL's position herein differs in important ways from that of Respondent and other amici, NACDL respectfully moves for leave to present a brief oral argument.

SUMMARY OF THE ARGUMENT

In its Brief, Petitioner concedes that, "aerial surveillance is a new application of the broad constitutional principles behind the prohibition of warrantless search and seizure", Brief of Petitioner at 14. Although the application may be new, the principles themselves remain unchanged. Where a householder has put the world on notice of his expectation of privacy as to his home and property, society is constitutionally bound to respect that privacy; and to refrain from violating it, not merely in the most convenient or commonplace manner, but from any distance or vantage point, and by any technology. This Court could have no better opportunity than that presented by the instant facts to instruct law enforcement officers that, although modern aeronautics may have given them the ability to rise above rooftops and fences, it does not entitle them to rise above the warrant requirement.

ARGUMENT

I. RILEY'S EXPECTATION OF PRIVACY IN HIS HOME AND CURTILAGE AGAINST PURPOSEFUL POLICE SURVEILLANCE FROM ABOVE WAS REASONABLE.

A. Katz and the Significance of Navigable Public Airspace.

On September 2, 1982, Santa Clara police received an anonymous tip that Dante Ciraolo was growing marijuana in his backyard. The yard itself was entirely enclosed by a six-foot outer fence and a ten-foot inner fence, so two police officers obtained a plane and flew over Ciraolo's house at an altitude of 1,000 feet. From that vantage point they observed and photographed marijuana plants within the curtilage of Ciraolo's home. It was only then that they obtained a search warrant. Ciraolo at _____, 1810-11.

In assessing Ciraolo's challenge to the constitutionality of such a warrantless search, this Court applied the familiar two-prong test of Katz vs. United States, 389 US 347, 360 (1967) (Harlan, J., concurring). As to the first, or subjective prong, the Court readily conceded that by virtue of the six- and ten-foot fences surrounding his property Ciraolo had, "(c)learly--and understandably--met the test of manifesting his own subjective intent." *Id*. at ________, 1811.[2] But the Court found that the second element of *Katz*, requiring that a subjectively-expressed expectation of privacy also be objectively reasonable, was not present, and this for two reasons: first, it was unreasonable for Ciraolo to expect that he had secured the privacy of his home and curtilage from an observer in navigable airspace[3] acting in a physically nonintrusive fashion. The police officers in question made their observations from a public vantage point, much as if they had been walking down a public thoroughfare. Second, it was unreasonable to consider that Ciraolo had secured the privacy of his home and curtilage from purposeful police overflights when he had clearly not secured his privacy from ordinary commercial flights which might happen to pass over his home, and from which a disinterested passenger might happen to catch a fleeting glimpse of his curtilage.

At common law, he who owned the land owned up to the heavens. Under modern federal law, the homeowner's share of the heavens ends where navigable airspace begins. Navigable airspace is simply that airspace above the minimum altitudes of flight as prescribed by regulation. 49 USC 1304, 1301 (29). The minimum altitude for a fixed-wing aircraft is 1,000 feet over a congested area and 500 feet over a non-congested area. 14 CFR 91.79(b) and (c). Helicopters may be lawfully operated at less than minimum

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[2] Similarly in *Riley*, the Florida Supreme Court found that, "As in *Ciraolo*, there is no question in this case that the first prong of the *Katz* test has been met." *Riley* at 286.

[3] 49 USC App. 1304, 1301 (29). See discussion *infra* at 7-8.

altitudes so long as the operation is conducted without hazard to persons or property on the surface. 13 CFR 91.79(d).

Prior to Katz, the householder's Fourth Amendment protection was physically contiguous with his common law real property rights. See, e.g., Silverman vs. United States, 365 US 505 (1961); Goldman vs. United States, 316 US 129 (1942). Searches that were the equivalent of trespass were barred. Others were not. This archaic analysis has been entirely overthrown by the recognition in Katz that the Fourth Amendment protects people, not places. From the standpoint of noise, danger, and disruption of peace of mind, low altitude flyovers are more intrusive than high altitude flyovers; and it is probably true that, measured by these criteria, the lower the flight, the greater the intrusion into interests that the Fourth Amendment is calculated to protect. But to view navigable airspace as a property line in the

sky, and to view aerial surveillance below that property line as mere impermissible trespass, is an outmoded and incorrect application of the Fourth Amendment. Indeed aerial searches conducted from the highest altitudes and employing advanced photographic equipment are an infinitely more invidious threat to protected privacy, because they can be conducted without the citizen even knowing of their existence. Whatever the evils of a low altitude helicopter surveillance--"the thrashing of the rotor, the clouds of dust, the earsplitting din", NORML vs. Mullen, 608 F.Supp. 945, _____ (N.D.Cal. 1985)--they at least serve to put the householder on notice of the fact of police scrutiny. He may curtail his activities, relocate them to a basement, or even leave the jurisdiction. High altitude surveillance, especially when coupled with high-tech photographic equipment, affords the householder no notice of observation, and is for that reason all the more inconsistent with and destructive of Fourth Amendment values. The householder goes on with private, perhaps intimate, family activities, blithely unaware that Big Brother is watching.

The locution "the Fourth Amendment protects people, not places" is associated with Katz, but the notion embodied in that locution was fully entrenched in the jurisprudence of the Fourth Amendment decades before Katz. See, e.g., Goldman vs. United States, supra, at 139 (Murphy, J., dissenting) ("whether the search of private quarters is accomplished...by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is...invaded by agents of the government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant...are at one with the evils which have heretofore been held to be within the Fourth Amendment"); Olmstead vs. United States, 277 US

438, 471 (1920) (Brandeis, J., dissenting); Boyd vs. United States, 116 US 616, 627-30 (1886) ("it is not the breaking of [the householder's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security [and] personal liberty"). Navigable public airspace is nothing more than a horizontal property line in the sky. Like a vertical property line running with the land, it tells us little or nothing about the contours of the personal rights that the Fourth Amendment is calculated to protect.

Ciraolo's reliance on public navigable airspace and the "physically non-intrusive" manner in which the search visited upon Ciraolo (and upon Riley) was conducted is in direct derogation of Katz, and should for that reason be abandoned. If modern aeronautics has provided government with the wherewithal to observe and record minute details of family activity taking place on the porch, in the house, or within an enclosed backyard, then it has provided government with the wherewithal to violate the householder's privacy. It is plain nonsense to suggest that "the people" can be "secure in their persons, houses, papers, and effects" while the government looks on from above. If the framers had meant to add at the close of the first clause of the Fourth Amendment, "violated by trespass", or "violated in a physically intrusive manner", they could have done so. They did not.

B. The Objective Reasonableness of Riley's Expectation of Privacy.

As empirical support for the remarkable conclusion that Ciraolo's expectation of privacy was objectively unreasonable, the Court offered this equally remarkable observation: "any member of the public flying in (navigable) airspace who glanced down could have seen everything that...(the police) officers observed." Ciraolo

at ______, 1813. If this is true--if Ciraolo's expectation of privacy was objectively unreasonable simply because a passenger on a commercial airline might catch a fleeting glimpse of an unidentified and unidentifiable backyard--then one of two corollaries necessarily follows. Either there exists no set of circumstances pursuant to which Ciraolo's expectation of privacy in his own curtilage would be objectively reasonable; or, Ciraolo's six- and ten-foot fences being insufficient to support the reasonableness of such an expectation, it would be necessary for him to encase his curtilage and backyard under some kind of opaque dome.

If the former conclusion is the true teaching of Ciraolo and the necessary holding in Riley, then Ciraolo is truly the most remarkable opinion of our times, overthrowing not only the entire teaching of Katz and its progeny but the entire jurisprudence of the curtilage doctrine as

well. See generally Oliver vs. United States, 466 US 170 (1984); Taylor vs. United States, 286 US 1 (1932); United States vs. Williams, 581 F.2d 451 (5th Cir. 1978) cert. denied 440 US 972 (1979); Walker vs. United States, 225 F.2d 447 (5th Cir. 1955); State vs. Rickard, 420 So.2d 303 (Fla. 1982); Norman vs. State, 379 So.2d 643 (Fla. 1980); State vs. Fierge, 673 SW.2d 855 (Mo. App. 1984); Brown vs. Okalahoma City, 721 P.2d 1346 (Okla. App. 1986). If the latter alternative is true--if the Ciraolos and Rileys of this world must encase their homes and yards in opaque domes in order to assure themselves that their expectations of privacy will be viewed as objectively reasonable by society--this Court must abandon an equally lengthy and venerable line of cases holding that just the opposite is true. As one court has observed, such extreme measures would cause the householder to:

> sustain the...intangible cost of shutting out the sunlight and

> fresh air which give such a space its precious character. Surely, one has reason to expect that he need not "encase himself" (and his property) in a light-tight, airproof box.

People vs. Cook, 710 P.2d 299, 305 (Cal. 1985) citing Lorenzana vs. Superior Court, 511 P.2d 33 (Cal. 1973). Accord, State vs. Ward, 617 P.2d 568, 573 (Hawaii 1980); Wheeler vs. State, 659 SW.2d 381, 390 (Tex. Crim. App. 1982); Riley at 289 fn. 11.

A more reasonable position is that urged in Cook, supra:

> The fact that government officials or members of the civilian public might be expected, for one reason or another, to enter a place or see or hear the activities within, does not necessarily preclude reasonable claims of privacy of intensive spying by police officers looking for evidence of crimes.... One's yard may unavoidably be exposed to casual glances by passing aircraft, but he may still reasonably assume that it will not be intently examined by government agents who are flying over for that

> specific purpose.

Cook at 304. Accord, Ciraolo, supra at ______, 1818 (Powell, J., dissenting); Katz at 351-2 ("what [the householder] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

If the sense of privacy afforded by walls and fences is objectively unreasonable because it can be frustrated by airplanes and helicopters, then it must follow that the privacy the householder claims in the innermost sanctum of his house will be rendered objectively unreasonable when helicopters and airplanes are fitted with infrared detection devices or other scientific equipment capable of penetrating hearth and home. Against such a notion this Court should firmly set its face.

> The "reasonableness" of an individual's expectation of privacy is not defined solely by technological progress. We reject the Orwellian notion that precious liberties derived from the framers simply shrink as the government acquires new means of infringing them.

Cook at 305. Accord, Riley at 286 ("private activities do not lose their Fourth Amendment protection merely because technology exists which enables the police to view the activities from an otherwise non-intrusive vantage point"); LaFave, "The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence", 28 Arizona Law Review 291, 307 (1986) ("it hardly makes sense to read Katz as meaning that we assume the risk of whatever technology the government can bring to bear upon its investigative efforts").

The house need not be invulnerable for the householder's expectation of privacy to be reasonable. Rain may enter through the roof, wind may enter through the windows, television and radio waves may enter through the walls themselves; but the uninvited eye of government may not enter. It is not the roof, nor the window, nor even the walls themselves that bar the uninvited eye. It is the Fourth Amendment.

II. THE AERIAL SURVEILLANCE OF RILEY'S HOME AND CURTILAGE WAS A SEARCH, REQUIRING EITHER A WARRANT OR CONFORMITY TO A RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT.

Dictionaries generally define "to search" as "to make a thorough examination" or "to look over carefully in order to find something". Similarly, case law has traditionally used the term "search" to mean "some exploratory investigation...a looking for or seeking out". See generally C.J.S. Searches and Seizures Section 1; also Hale vs. Henkel; 201 US 43 (1906). Where police fly over a particular home or enclosed yard for the express purpose of checking that home or yard for marijuana plants, it seems silly to suggest that what has taken place is not a search. Police aerial surveillance does not happen by accident. Such "exploratory investigation", such "looking for or seeking out" directed at the home

or curtilage is, in fact, a search. See generally Cook, supra; People vs. Sneed, 108 Cal.Rptr. 146 (1973); accord, State vs. Kender, 588 P.2d 447 (Haw. 1979); State vs. Barns, 390 So.2d 1243 (Fla. 1st DCA 1980). There should be no confusion about the role, if any, to be played by Katz in characterizing an act of police aerial surveillance as a search. The Katz analysis does not answer the question: did a search take place? Katz answers the question: assuming a search took place, is it one to which this particular defendant may object?

It is conceded that the search of Riley's home, curtilage, and yard was conducted without a warrant. Thus to pass constitutional muster, the search must fall within one of the narrowly tailored warrant exceptions. From the language in Ciraolo that the police were lawfully situated in navigable public airspace at the time of the search flows the implication that the search itself was reasonable under some version of the "plain view" exception to the warrant requirement. If this implication from *Ciraolo* was intentional, it should be discarded as clearly at odds with the jurisprudence of the "plain view" exception. *United States vs Bassford*, 812 F.2d 16, 19 (1st Cir. 1987) (John Minor Wisdom, J.) ("*Ciraolo*...narrow[s] the protection of the Fourth Amendment, and...over-expand[s] the plain view doctrine").

Plain view discoveries must be inadvertent, not purposeful. *Coolidge vs. New Hampshire*, 403 US 443, 469 (1971); *Texas vs. Brown*, 460 US 730, 737 (1983). While at least one member of this Court has expressed reservations about the viability of the inadvertence requirement, see *Arizona vs. Hicks*, _____ US ____, 107 S. Ct. 1149, 1155 (1987) (White, J., concurring), the inadvertence requirement is thoroughly entrenched in the jurisprudence of the plain view exception and consistently relied upon as such by state and federal courts. See *United States vs. $10,000 in U.S. Currency*, 780 F.2d 213 (2d Cir. 1986); *United States vs. Whitten*, 706 F.2d 1000 (9th Cir. 1983) cert. denied 465 US 1100; *United States vs. Taylor*, 683 F.2d 18 (1st Cir. 1982) cert. denied 459 US 945; *United States vs. Freeman*, 685 F.2d 942 (5th Cir. 1982); *United States vs. Weber*, 668 F.2d 552 (1st Cir. 1981) cert. denied 457 US 1105; *United States vs. Liberti*, 616 F.2d 34 (2d Cir. 1980) cert. denied 446 US 952; *United States vs. Antill*, 615 F.2d 648 (9th Cir. 1980) cert. denied 449 US 866; *United States vs. Sanders*, 631 F.2d 1309 (8th Cir. 1980) cert. denied 449 US 1127; *United States vs. Hare*, 589 F.2d 1291 (6th Cir. 1979); *United States vs. Diaz*, 577 F.2d 821 (2d Cir. 1978); *United States vs. Schire*, 586 F.2d 15 (7th Cir. 1978); *United States vs. Duckett*, 583 F.2d 1309 (5th Cir. 1978); *United States vs. Anderson*, 552 F.2d 1296 (8th

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In NORML vs. Mullen, supra, the government attempted to justify helicopter surveillance of private homes, similar to that visited upon Riley, by reference to the plain view doctrine. The court responded:

> (The government) further suggests that some permutation of the "plain view" doctrine protects their prying as a matter of law. Rather, just as a (police officer) on the ground cannot on a whim climb a fence to peer into a house otherwise protected from his view, a (police) helicopter cannot randomly position itself over a home to leisurely contemplate the scene below. Even when (police officers) are at a lawful vantage point, the plain view doctrine "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges".

NORML at 957-8 (citation omitted). Apart from its failure to conform to the inadvertence requirement of the plain view doctrine, the search visited upon Riley also fails the threshold requirement of that doctrine: that the officer, at the time he makes the plain view discovery, be somewhere he has a right to be doing something he has a right to do. It is an aspect of plain view doctrine too fundamental to require citation that, for example, a police officer may have a perfect right to climb a tree to rescue a child's cat, and while in the tree may happen to observe marijuana growing in Michael Riley's yard, and may then obtain a warrant in reliance on that observation; but that the same officer may not climb the same tree for the express purpose of peering into Michael Riley's yard in hopes of seeing marijuana not otherwise visible. See, e.g., State vs. Adams, 378 So.2d 72 (Fla. 3rd DCA 1979); State vs. Person, 298 N.E. 2d 922 (Ohio, 1973); Pate vs. Municipal Court, 89 Cal.Rptr. 893 (1970); Cohen vs. Superior Court, 85 Cal.Rptr. 354 (1976). The same principle is at work here. The issue before this Court is not whether police may fly over Riley's home, nor even whether they may act upon observations made while flying over Riley's home, but whether, without warrant, they may exploit the power of flight for the express purpose of viewing activities in Riley's home which would otherwise remain private and unseen. That the purposeful nature of given police activity may render

unconstitutional actions which would otherwise be constitutionally inoffensive is hardly a remarkable proposition cf., e.g., Colorado vs. Bertine, _ US _, 107 S.Ct. 738 (1987).

To describe what happened to Michael Riley as anything but a search is to stand the plain meaning of words on its head. The police set out to search Riley's property for marijuana, they searched his property for marijuana, and they found marijuana as a result of their search. Such a search could be conducted only pursuant to warrant or to a recognized exception to the warrant requirement. Because neither condition was met, the search was incompatible with the Fourth Amendment.

III. THE FACTS IN THE INSTANT CAUSE AFFORD THIS COURT AN IDEAL OPPORTUNITY TO RECEDE FROM THE DOCTRINE OF CIRAOLO AND RETURN TO THE MAINSTREAM OF PREVIOUS FOURTH AMENDMENT JURISPRUDENCE.

It would be easy for this Court to

distinguish this case from Ciraolo on the facts. The Florida Supreme Court did just that, focusing on the distinction

> between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that occupants can look through an opening in a roof.

Riley at 287. These factual distinctions are not ephemeral. It would be easy for this Court to distinguish this case from Ciraolo; but it would be wrong. It would be wrong not because what happened to Mark Riley was constitutional but because what happened to Dante Ciraolo was unconstitutional. The difference between helicopters and fixed-wing aircraft is of great moment to aeronautical engineers, but if the veil of privacy which the Fourth Amendment draws over Riley's little corner of the world has been pierced, it matters not, in constitutional terms, which of several mechanical means was used to pierce it. And that his private world was laid

bare from more than 400, or more than 1,000, feet can afford only cold comfort to Riley. Whatever the means by which it is violated, whatever the distance at which it is violated, "the right to be let alone (is still) the most comprehensive of rights and the right most valued by civilized men", Olmstead, supra, at 478 (Brandeis, J., dissenting).

It would be easy for this Court to treat this case as one in which Fourth Amendment protections must be balanced against society's interest in eradicating the curse of illegal drugs. That was clearly the cynosure of the Ciraolo opinion, with its references to "unlawful agricultural pursuits", Ciraolo at _____, 1811 and "illicit drugs", id at _______, 1813.[4] But this case is not about drugs. If Officer Gell, during his airborne search, had looked into Mark Riley's curtilage and seen Riley with another man's wife, this case would not be about adultery. If he had seen Riley sunbathing in the nude, this case would not be about exhibitionism. And if, aided by telescopic equipment, he had seen Riley confessing to a diary thoughts too private, too painful to be confessed even to a priest, this case would not be about penmanship. The Fourth Amendment provides neither more nor less protection to the man who cultivates his garden than it does to the man who cultivates his neighbor's wife, his tan, or his immortal soul.

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[4] In the same vein, Petitioner's Brief threatens that if police are required to obtain a warrant before conducting aerial surveillance, "society will be overwhelmed by increasingly sophisticated criminals", Brief of Petitioner at 26; Florida will be "awash in illegal drugs", id. at 27; and we will all be obliged, "to...surrender

It would be easy for this Court to decide this case by reference to the use or not of advanced technology. Because neither the helicopter nor the camera employed by Officer Gell was anything but ordinary by today's aeronautical and photographic standards, it would be easy to distinguish this case from one in which arcane technology was deployed. It would be easy, but it would be wrong. The householder's Fourth Amendment privacy interest is not to be measured in terms of the complexity of the technology needed to frustrate it. If airborne searches at 500 feet may be invasive of protected privacy, surely airborne searches at 10,000 feet using telescopic equipment which provides a degree of visual acuity that the unaided eye could never achieve are likewise invasive. See, e.g., United States vs. Kim, 415 F.Supp. 1252 (D.Haw. 1976); Barryhill vs. State, 372 So.2d 355 (Ala.Civ.App. 1979); Raettig vs. State, 406 So.2d 1273 (Fla. 1st DCA 1981); Commonwealth vs. Williams, 431 Atl.2d

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in the war on drugs", id. at 27. Even if these claims were taken at face value--and it is difficult to imagine that the uprooting of Mark Riley's pathetic handful of marijuana stalks constitutes a major victory in the war against drugs--such shameless histrionics have no place in the framing of issues before this Court.

964 (Pa. 1981).

Petitioner urges this Court in strongest terms to resolve this case by framing a "bright line rule"; indeed the locution "bright line rule" or "bright line test" appears more than a dozen times in Petitioner's Brief. But a bright constitutional rule governing this case and others like it is already in place. It is the familiar rule that a search conducted without warrant is presumptively unreasonable, subject only to certain narrowly-drawn exceptions none of which is remotely applicable here. True, the ruthless application of that rule to these facts would permit Mark Riley to go unwhipped of justice. But as this Court recently observed with simple eloquence, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Arizona vs. Hicks, supra at ____, 1155.

CONCLUSION

Wherefore, the decision of the Florida Supreme Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Milton Hirsch, a member of the Bar of this Court, certify that three copies of the Brief of amicus curiae the National Association of Criminal Defense Lawyers were served this 20 day of June, 1988, by United States mail, postage pre-paid upon:

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In the Supreme Court of the United States

OCTOBER TERM, 1987

THE PEOPLE OF THE STATE OF FLORIDA,
Petitioner,
vs.
MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND CIVIL LIBERTIES MONITORING PROJECT AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether ground observations from a helicopter at an altitude of 400 feet over residential backyards violate reasonable expectations of privacy within the meaning of the Fourth Amendment.

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No. 87-764

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE PEOPLE OF THE STATE OF FLORIDA,
Petitioner,
vs.
MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND CIVIL LIBERTIES MONITORING PROJECT AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The California Attorneys for Criminal Justice ("CACJ") is a state-wide criminal defense bar comprised of 1,900 attorneys active in criminal defense. CACJ seeks to intervene as Amicus Curiae in cases involving serious impact on the administration of criminal justice.

The Civil Liberties Monitoring Project ("CLMP") is a nonprofit California corporation with principal focus on the continued preservation and enhancement of individual rights and liberties. CLMP engages in discussions and other forms of education concerning civil liberties and civil rights. General aerial surveillance by helicopter can threaten the privacy and welfare of the organization's members, particularly because many of its members live in isolated areas in rural counties subject to this new law enforcement technique. CLMP has been engaged in class action litigation with the United States and State of California, *inter alia*, challenging governmental helicopter surveillance as violative of civil rights. *National Organization for the Reform of Marijuana Laws (NORML) et al. v. Mullen et al.*, No. C83 4037 RPA, *main opinion found at* 608 F.Supp. 945 (N.D.Cal. 1985), *aff'd in part, remanded in part*, 796 F.2d 296 (9th Cir. 1986). *NORML v. Mullen* has resulted in a Consent Decree, *inter alia*, governing helicopter activities during marijuana raids in California through at least 1990.

SUMMARY OF ARGUMENT

The state writes as if the case concerned only a marijuana garden. In fact, at stake in this case is the privacy of Americans in their homes and curtilages.

Low flying helicopter surveillance of the curtilage unreasonably intrudes into the privacy of the curtilage—a privacy which society has reasonably expected since the beginning of the Republic. The intrusion caused by low flying helicopters is far greater than that caused by fixed-wing aircraft flying in public airspace.

Petitioner unreasonably asks this Court to condone warrantless helicopter surveillance of the curtilage from anywhere. Petitioner's rule has no basis in Fourth Amendment doctrine, and provides no guidance to law enforcement officers while in the field.

Amici respectfully ask this Court to formally acknowledge an aerial zone above the curtilage in which a privacy expectation exists and is protected by the Fourth Amendment. Amici thus propose a bright line rule which would prohibit warrantless helicopter surveillance from generally anywhere within a hemisphere extending 500 feet from the outer circumference of the curtilage of any residence. This bright line rule is suggested on the basis of the extensive marijuana helicopter litigation in *NORML v. Mullen*, and the standards embodied in the Consent Decree in that case.

ARGUMENT

I

LOW FLYING POLICE HELICOPTER OBSERVATIONS INTO THE CURTILAGE VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT

1. Low flying helicopter surveillance of the curtilage invades, harasses and intrudes into the sanctity of home and privacies of life.

Petitioner asserts that there is no "principled distinction between observation from a fixed-wing aircraft and a helicopter." Petitioner's Brief, page 24. Amicus, CLMP, represents residents of rural counties in California who have been subjected to low flying helicopter surveillance of their homes and curtilage since 1983 during the federal "war on drugs," undertaken through the guise of the Campaign Against Marijuana Planting ("CAMP") in California. The experience of class members in *NORML* illustrates the problem with petitioner's assertion when law enforcement is not operating under strict guidelines during marijuana helicopter activities, and exemplifies the severity of the intrusion which can be caused by unbridled low flying helicopter surveillance:

> One morning, Charles Keyes was at home with his five year old son, Arthur, when "four helicopters in a diamond shape came within 100 feet of our home, shaking and blowing the tree tops. At about 9:30, the largest helicopter came back, put the nose of the helicopter about 100 feet away at my eye level (I live on a hillside) and hovered watching me defecate on my outhouse. I didn't move, so he moved right above me. He blew the toilet paper away from me and Arthur had to retrieve it for me. Arthur and I left the property as I feared for our safety."
>
> Marilyn Beckwith was similarly disturbed when she was "continually buzzed" while taking her outdoor shower.
>
> * * *
>
> Timothy Taylor was working on a carpentry job when three CAMP helicopters "made at least 20 passes directly over the house I was working on at levels I estimate to be 50 to 150 feet above the house. There was no reason for the copters to fly over the house, as there are hundreds of acres in the area without any structures. The copters made at least three passes specifically checking out what was happening at the house site. On all of the passes, the madrone and oak trees were shaking. The copters came so close that they drowned out the sound of the gas generator and skillsaws."

> Alison Osborn testified about one of the several low flights over her home: "The reason I think it was 50 feet is it was right above the tree level, right outside my house, right over my house and at that time they took to their helicopters several times and one of [the] times, made obscene gestures at my seven year old daughter who was standing on the ladder watching. . . ."
>
> When asked what it was like to have a helicopter passing over her at 50 or 100 feet, Osborn responded: "Well, when it's down at 50 feet your hair is actually blowing out and the leaves from the trees are blowing down on your head and the children are kind of hanging on to you because it feels like you'll be gusted away. The fact of the matter is it's terrifying and it's—it feels like you're in Viet Nam in the Viet Nam War and the things you saw on television."

NORML, *supra*, at 608 F.Supp. 955-56.[1]

---

[1] In the original decision in *NORML*, based upon CAMP activities in 1983 and 1984, the court issued a preliminary injunction governing all helicopter and on-ground CAMP field operations in California. In a subsequent opinion, the district court found it necessary to modify the injunction and appoint a Monitor pursuant to Fed.R.Civ.P. 53 due to CAMP personnel non-compliance with the original injunction. 112 F.R.D. 120 (N.D.Cal. 1986), *aff'd*, 828 F.2d 536 (9th Cir. 1987). The modifications to the original injunction required CAMP to engage in daily planning activities to avoid violations of citizens' rights. Following this Court's decisions in *California v. Ciraolo*, 476 U.S. 207 (1986), and *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), on partial remand, see 796 F.2d 296, the district court issued a clarification of the helicopter restrictions in the preliminary injunction. These modified restrictions prohibited helicopter flight and surveillance anywhere within a hemisphere extending 500 feet from the outer circumference of the curtilage of any residence. In December 1987 a Consent Decree signed by all parties to the litigation issued, accepting, *inter alia*, the 500 foot hemisphere restriction on helicopter flight.

2. Society reasonably expects that the curtilage will be free from warrantless governmental intrusion by low flying helicopters.

It is well settled that an individual may legitimately demand privacy for activities conducted within the curtilage. *See, e.g., Oliver v. United States,* 466 U.S. 170, 178 (1984):

> This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the framers that certain enclaves should be free from arbitrary government interference. For example, the Court, since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our tradition since the origins of the republic." *Payton v. New York,* [445 U.S. 573, 601 (1980)].

Thus, warrantless intrusions into the home and curtilage are *per se* unreasonable, subject to a few exigent circumstances exceptions. *See, e.g., Payton v. New York,* 445 U.S. 573, 601 (1980).

This Court's holdings in *California v. Ciraolo,* 476 U.S. 207 (1986), and *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986), do not overrule the fundamental precept of the Fourth Amendment that the home area is sacred, and indeed recognize that governmental surveillance from "non-public" airspace violates societal expectations of privacy for activities conducted within the home.[2]

---

[2] Petitioner's contention that the Fourth Amendment does not protect against visual surveillance squarely contradicts well

(Continued on following page)

In *NORML,* on partial remand of the preliminary injunction, 796 F.2d 296, the district court analyzed *Ciraolo* and *Dow* in the context of helicopter surveillance:

> In *Ciraolo,* police officers investigating a tip flew over respondent's home in an airplane at an altitude of 1,000 feet. The officers readily identified marijuana plants growing in the yard, obtained a search warrant, and seized the plants. After the trial court denied respondent's motion to suppress, he pleaded guilty to a cultivation charge.
>
> The Court found that respondent's expectation of privacy from all government observations of his backyard was unreasonable. That the illicit crop was within the "curtilage" of the home did not itself bar all police observation. The pertinent inquiry was " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo* at [106 S.Ct.] 1812, quoting *Oliver v. United States,* 466 U.S. 170, 180-83 (1984). The Court concluded that the "Fourth Amendment simply does not require police traveling in the public airways at [1,000 feet] to obtain a warrant in order to observe what is viable to the naked eye." *Id.* at [106 S.Ct.] 1813.
>
> Significantly, the Court took pains to note that the overflight was conducted "lawfully" and in "a physi-

---

Footnote continued—

settled Fourth Amendment doctrine first articulated in *Katz v. United States,* 389 U.S. 347, 353 (1967): "[O]nce it is recognized that the Fourth Amendment protects people—and not 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." This principle was not overruled in either *Ciraolo* or *Dow Chemical Co.*

cally nonintrusive manner," *id.* at [106 S.Ct.] 1812, 1813, and to acknowledge the State's concession in *Dow Chemical* that "[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *Id.* at [106 S.Ct.] 1814 n.3 (emphasis added).

The facts of *Ciraolo* and *Dow Chemical* are readily distinguishable from those of the case at bench. Plaintiffs here do not complain about single overflights of airplanes at 1,000 feet or higher, but of helicopters deliberately and repeatedly "hovering" over, "buzzing," and "dive bombing" their homes at altitudes as low as 50 to 100 feet. As detailed in summaries of testimony at 608 F.Supp. 951-59, law abiding class members have been embarrassed in very private moments by hovering craft, and have found helicopters landing on their property, pursuing them when they were on foot, horseback, or in vehicles. Some plaintiffs appear to have suffered property damage as a result of these practices. The witnesses described the tremendous noise, wind, and psychological impact caused by these low flights, and this Court found that CAMP's helicopter practices "at best disturb and worst terrorize, the hapless residents below." 608 F.Supp. at 957. . . .

* * *

Finally, in contrast to the "routine" character of the *Ciraolo* and *Dow Chemical* flights that were "lawfully" conducted in navigable airspace, *Ciraolo* at [106 S.Ct.] 1813, *Dow Chemical* at [106 S.Ct.] 1822, this Court found that CAMP helicopter pilots regularly violated federal aviation regulations, and endangered the safety of those on the ground. 608 F.Supp. at 959. Indeed, defendants' violations of these federal safety laws provided an independent ground for the relief granted, in addition to the constitutional grounds. *Id.* at 961 n.13.

In the light of the substantial factual record developed in this case, the Court does not hesitate to find that "the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Ciraolo* at [106 S.Ct.] 1812, quoting *Oliver v. United States,* 466 U.S. 170, 180-83 (1984). The altitude and route restrictions enumerated in the preliminary injunction are fully merited by both the fourth amendment and federal air safety standards. The restrictions may in fact be too lenient; even at 500 feet helicopters can be raucous and unnerving to residents seeking privacy, peace and quiet in the shelter of their homes and curtilages.

To comport with the fourth amendment analysis of *Ciraolo* and *Dow Chemical,* the Court modifies paragraph 3 of the preliminary injunction to read as follows:

> 3. When conducting surveillance, helicopters shall comply with the provisions of 14 C.F.R. Sections 91.9 and 91.79(b) and (c), but in no case shall fly within 500 feet of any structure, person or vehicle. Helicopters surveying in the vicinity of residential structures shall not fly within the hemisphere extending 500 feet from the outer circumference of the curtilage of any residence.

Order Modifying Paragraph 3 of the Preliminary Injunction, filed September 16, 1986.

II

A CLEAR, EASILY FOLLOWED RULE WOULD PROHIBIT ALL HELICOPTER SURVEILLANCE OF THE CURTILAGE FROM AN ALTITUDE BELOW 500 FEET

1. Prohibiting helicopter surveillance of the curtilage from altitudes within a hemisphere of 500 feet surrounding the curtilage would provide a clear standard for law enforcement officers.

This Court has repeatedly asserted that clear, easily articulated rules are vital to Fourth Amendment protections: "a single, familiar standard is essential to guide police officers who have only limited time and expertise to reflect on and balance social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York,* 442 U.S. 200, 213-214, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).[3]

A clear standard is especially important with respect to helicopter surveillance due to the unique flying capabilities of helicopters which allow them to hover and maneuver in limited distances. These capabilities readily distinguish low flying helicopter surveillance from that of fixed-wing aircraft operating above 1000 feet in the public navigable airspace.

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[3] *See also New York v. Belton,* 453 U.S. 454, 458-459, 101 S.Ct. 2860 (1981); *Michigan v. Summers,* 442 U.S. 692, 101 S.Ct. 2587 (1981); *Illinois v. Lafayette,* U.S. , 103 S.Ct. 2605, 2610; *Oliver v. United States,* 466 U.S. 170, 181 (1984); *O'Conner v. Ortega,* U.S. , 107 S.Ct. 1492, 1505 (1987); *Colorado v. Bertine,* U.S. , 107 S.Ct. 738, 742 (1987).

As recognized by the court in *NORML v. Mullen, supra,* at 608 F.Supp. 957:

> It is not just the highly disruptive character of low helicopter flights that distinguishes them from the common airplane overflights that we are all accustomed to, but also the degree of their intrusiveness into "the privacies" of life; an airplane can see far less than a helicopter that is hovering outside a bedroom window or over an open outhouse or shower. This case demonstrates how the unique versatility of helicopters renders them at once an effective law enforcement tool and an unprecedented threat to civil liberties.

Amici thus propose a bright line rule that would prohibit all warrantless helicopter surveillance of the curtilage undertaken from within a hemisphere extending 500 feet from the outer circumference of the curtilage of any residence. The 500 foot line represents a well recognized boundary for minimum safe altitude flight near persons and structures as set forth in Federal Aviation Administration regulations, 14 C.F.R. section 91.79 (b)(7) (1988). Moreover, this proposed rule is based on reasonable expectations of privacy for activities conducted within the curtilage and would strike a compromise between competing interests of these expectations and law enforcement goals.

2. Amici's proposed bright line rule is consistent with Ciraolo and is readily understandable.

As noted, on December 18, 1987, the district court in *NORML* gave final approval to the Consent Decree in that case. Part 3(B) defines the helicopter restrictions which we urge this Court to adopt as the bright line zone of privacy:

1. Helicopters conducting surveillance shall comply with the provisions of 14 C.F.R. Sections 91.9 (b) and (c), but shall not knowingly fly within 500 feet of any structure, person or vehicle. Helicopters surveying in the vicinity of business or residential structures shall not knowingly fly within the hemisphere extending 500 feet from the outer circumference of the curtilage of any residence.

2. Except over open fields, helicopters shall maintain an altitude of at least 500 feet except when landing on, loading from, unloading to, or departing from an eradication site or landing zone, or when safety otherwise requires. When ferrying personnel, supplies or cut crops, the helicopters shall take the most direct route available that overflies the fewest possible private residences, unless safety requires otherwise. Where safety or operational feasibility requires deviation from paragraphs 1 and 2 of this section, and/or the pre-planned flight path, the pilot shall file a report documenting the deviation with the team leader and/or lead deputy. When such deviation is known, or can be anticipated prior to the flight, it shall be part of the pre-flight briefing and the pre-flight briefing report.

3. Identifying numbers and marks on helicopters (and fixed-wing aircraft) shall be clearly identifiable and shall not be covered, defaced, or otherwise obscured.

Amici believe it is important to note that the federal government is a signator to this agreement following a lengthy review process.[4]

A rule prohibiting helicopter surveillance from within a 500 foot hemisphere surrounding the curtilage is consistent with the standard established by this Court in *Ciraolo*. *Ciraolo* holds that naked eye observations made from within the public navigable airspace do not violate reasonable expectations of privacy. In accordance with 49 U.S.C. section 1301(29) and 14 C.F.R. section 91.79 (1988), public navigable airspace over non-congested areas is above 500 feet.

As pointed out by the Florida Supreme Court in the case *sub judice*, this Court's holding in *Ciraolo* does not sanction "an unlimited right to any type of examination of residential property from the air. Indeed, we note the care taken to qualify and limit the permissible observation to the 'naked eye' from 'navigable airspace' at an 'altitude of 1000 feet' in a 'physically nonintrusive manner.'" *Riley v. State*, 511 So.2d 282, 287 (Fla. 1987).

3. Petitioner's proposed rule would not provide clear guidance to law enforcement.

Petitioner argues for a "bright line" rule defined by Federal Aviation Administration Regulations. This rule would enable police to undertake surveillance of the curtilage by fixed-wing aircraft at 1,000 feet or higher, or by helicopter from anywhere "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator." 14 C.F.R. section 91.79(d) (1988).

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[4] We were informed prior to federal approval of the terms of the Consent Decree that its terms received approval from the heads of the criminal, civil and lands divisions of the U.S. Department of Justice and from the Office of the Solicitor General. We believe the review process and approval by the federal government is extremely significant, and lends strong support to our "bright line" proposal.

At best, the only guidance this rule provides would be to allow governmental surveillance of the curtilage by helicopter from anywhere—a rule patently contradictory to the unique protections of the curtilage offered by the Fourth Amendment. At worst, petitioner's rule places the Federal Aviation Administration as guardian of Fourth Amendment protections: as F.A.A. regulations change, so too would the boundaries of privacy expectations.

Petitioner's rule would require a case-by-case, *post hoc* analysis of competing expectations of privacy, law enforcement interests, and safety concerns. This is the exact result sought to be avoided by "bright line" rules.

The 500 foot hemisphere rule proposed by Amici, however, could be followed easily by law enforcement officers in the field through the use of altimeters located in the helicopters.

CONCLUSION

The California Attorneys for Criminal Justice and Civil Liberties Monitoring Project respectfully request this Court to decide that the intentional low-flying helicopter intrusion into the sanctity of Riley's curtilage was a Fourth Amendment search requiring probable cause and a search warrant. At a minimum, warrantless helicopter searches are *per se* unreasonable and in violation of the Fourth Amendment when made from within a hemisphere extending 500 feet from the outer circumference of the curtilage.

Respectfully submitted,

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No. 87-764

IN THE

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OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

**On Writ Of Certiorari To The
Supreme Court of Florida**

BRIEF ON BEHALF OF COMMUNITY OUTREACH TO VIETNAM ERA RETURNEES, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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No. 87-764

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BRIEF ON BEHALF OF COMMUNITY OUTREACH TO VIETNAM ERA RETURNEES, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Community Outreach to Vietnam Era Returnees (COVER) is an private, non-profit Virginia corporation whose purpose is to provide counseling to Virginia's Vietnam veterans. It files this brief with the consent of both

parties [1], and urges that the decision below be affirmed.

Since its inception in 1979, COVER has counseled approximately two thousand veterans of the Vietnam War. In connection with this service, COVER has had occasion to observe the stress which has been caused to Vietnam veterans by low-flying helicopter surveillance of their homes, as is currently carried out annually across Virginia at altitudes admittedly as low as 200 feet as part of Virginia's "Marijuana Eradication Program".

For many veterans, who are for the most part law-abiding citizens who have put their lives on the line to fight enemies of this country, the low-altitude buzzing of their homes and yards through use of large, military helicopters is disturbingly similar to the tactics employed against the enemy in the Vietnam conflict.

This Court may decide that the constitutional guarantee of privacy in one's home and curtilage does not prevent the warrantless helicopter surveillance of such areas at low altitudes. Such a decision would likely have a profound impact on Virginia's Vietnam veterans by legitimizing Virginia's present program [2].

---

[1] Letters of consent have been filed with the Clerk of this Court.

ARGUMENT

WARRANTLESS SURVEILLANCE OF HOMES AT ALTITUDES BELOW FIVE HUNDRED FEET VIOLATES CORE FOURTH AMENDMENT PROTECTIONS.

The sanctity of the home has always commanded a special protection both under the Fourth Amendment to the United States Constitution and under the common law upon which it was based. It is where "privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 213 (1986). The home is a haven where one can relax, be oneself, retreat from the rest of the world. It is the "home base" from the troubles which dog one elsewhere.

Justice William Blackstone said of the common law, "And the law of England has so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with

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[2] This program is presently being challenged in the Fourth Circuit Court of Appeals by five citizens, none of whom has any criminal record. See Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987). A decision in Letcher is being held in abeyance pending the outcome in this case by order dated March 18, 1988.

impunity." 4 W. BLACKSTONE, COMMENTARIES 1618 (Lewis ed.) He continued, "For what is more sacred, what more inviolate, than the house of every citizen?" [3] Id. (quotation omitted).

The sanctity of the home was so special to the drafters of this country's Constitution that it was explicitly protected not only in the Fourth but also the Third Amendment. And so important to the drafters of the Constitution was the haven of a home that, without a warrant based "upon probable cause, supported by Oath or affirmation,...", U.S.Const. amend IV, the home stands inviolate even when it houses evidence of criminal wrongdoings and even when this deference allows criminal activity to go undetected. This is the price our society was, at the time the Constitution was drafted, and hopefully still is prepared to pay to preserve this psychologically and sociologically important part of life, a private home.

Yet this concept of home has never been confined to an actual main structure. At the time the Fourth

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[3] The actual quote was in Latin: Quod enim sanctius, quid omni religione munitius; quam domus uniuscujusque civium?

Amendment was written, a home was often a collections of buildings joined by a yard, and many private, central activities of life were conducted outside of any central structure. E.g., Wellford v. Commonwealth, 227 Va. 297, 315 S.E.2d. 235 (1984). Cooking was commonly performed outside the house, as were laundering and other cleaning tasks. Even bathing has often been conducted outside a main building, either in the open or in a separate structure. Similarly, outhouses, significantly called "privies", have been commonplace in this country's history.

Though today many people live in apartment houses, having chosen to limit their privacy to the physical insides of four walls, the private lives of a significant percentage of this country's citizens still involve the use of a yard, or curtilage. For many citizens, the front yard and back remain as important a refuge from the rest of the world as the house physically under a roof. Bathing may in some cases still occur outside. Many country dwellers continue to have privies, or outhouses, and continue to air their laundry on lines in their yard.

It is not just rural dwellers, however, who have

privacy interests in the open spaces connected with their home. Homes with an authentic Spanish design often have patios, large open spaces in the middle of the house. Suburban dwellers often share private social moments as they relax in their backyards. Their patios may not be in the center of the home, but they are no less private, especially where other factors, such as fences or woodland, protect the patios from public view.

Thus, the walls of a house do not establish the perimeters of the privacy of a "home" protected by the Fourth Amendment. Rather, the curtilage around a home is, for privacy purposes, part of the home itself. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically,..." California v. Ciraolo, 476 U.S. at 212-13 (1986).

It is therefore beyond argument that our citizens have a reasonable, in fact heightened, expectation of privacy in their curtilages as part of their homes. E.g., Ciraolo. This expectation is so firmly entrenched in our common law and societal values that specific proof of subjective expectation of privacy in the home areas has never been required to ward off warrantless searches. Rather, the privacy expectation in the home is established de jure by the Fourth Amendment itself. E.g. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("a man's homes is,..., a place where he expects privacy,...").

At common law, however, the rights associated with a home included all of the airspace over the property as well. It was said that ownership of land extended to the periphery of the universe. 1 COKE, INSTITUTES 18 (19th ed. 1832). [4] This was the common law at the time the Fourth Amendment was adopted.

This was only altered by Congress' subsequent passage of 49 U.S.C. § 1304, providing the way for modern air transportation by providing for "freedom in transit". Accordingly, in this century, expectation of privacy, even while in the curtilage, is not an expectation from

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[4] The Latin quotation is: "Cujus est solum ejus est usque ad coelum".

all possible viewing, as airplanes now regularly traverse the airways. Rather, the expectation is necessarily limited by the knowledge that, far overhead, a member of the public may view the general outline of the house, the location of the trees, a car and even the physical location of a faceless person. This is part of the realities and necessities of modern life.

Yet this reality does not alter the reasonable expectation of privacy from anything closer or more intrusive than this. For those whose yards are not otherwise viewable by the public, it does not alter the reasonable expectation that they and their lives will remain basically anonymous and unobserved while in the privacy of their curtilages.

However, with air transportation came the ability to surveil by air. What is new and physically possible will be tried by eager law enforcement officials. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (wiretap), overturning Olmstead v. United States, 277 U.S. 438 (1928) (wiretap), and Goldman v. United States, 316 U.S. 129 (1942) (bugging device); Silverman v. United States, 365 U.S. 505 (1961) (spike mike driven into wall).

Not content with surveillance from normal airspace, government agents throughout the country, see, e.g., Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987); NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), amended, 828 F.2d 536 (9th Cir. 1987); Riley v. State, 511 So.2d 282, (Fla. 1987), have begun to surveil at lower than normal public airspace, at altitudes where precious anonymity is lost, where private activities and faces, not viewable to the public, may be seen and scrutinized.

This case then presents one of the latest, and perhaps most constitutionally dangerous, technological assaults on privacy, the intentional use of helicopters to fly over homes, there to descend to altitudes low enough to allow government agents to see what the general public cannot, and to do so without any probable cause whatsoever to believe that criminal activity is being conducted.

The issue of aerial surveillance of the home, like other issues involving technological assaults on protected privacy, see, e.g., Katz v. United States, overturning Goldman v. United States, has become an issue waiting to probe once again this country's commitment to the Fourth Amendment and to its continued vitality, and to force anew a review of the purpose of that amendment.

For if descents to 400 feet are constitutionally permissible in this case, so are descents to 200 feet, as is now being challenged in Letcher v. Garrett, as are descents to fifty feet, and, in fact, warrantless searches of the curtilage by land, and the death knell of home privacy has been sounded.

Yet this Court's pronouncements in the recent cases of California v. Ciraolo, 476 U.S. 207 (1986), and Dow Chemical Company v. United States, 476 U.S. 227 (1986), do not invite such eradication of the Fourth Amendment. In Ciraolo and Dow, the Court addressed for the first time the Fourth Amendment implications of aerial surveillance. Ciraolo involved an attempt to suppress evidence gained by surveillance at 1000 feet; Dow involved high-altitude aerial photographs of a commercial facility.

In both decisions, the Court recognized the important, reasonable, and therefore legitimate privacy expectations not only in a physical dwelling house but equally in the curtilage around it. In Ciraolo, the Court stated, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. at 212-13. In Dow, the Court noted, "We find it important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened." Id. at 237 n.4.

While recognizing the reasonable expectation of privacy in the curtilage, the Court also recognized that the Fourth Amendment does not require "law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id. at 213. Because — and only because — the evidence in Ciraolo was obtained from "public navigable airspace", id., in what amounted to a "public thoroughfare" (1000 feet), id., where "[a]ny member of the public" could have been, id., it was seen in plain view, not by virtue of a search.

Yet because new technologies can result in other

forms of unreasonable intrusion, Katz v. United States, 389 U.S. 347 (1967), this Court's opinion went further. It passed the surveillance in Ciraolo through a second test: whether it was conducted in an intrusive manner. As discussed below, helicopter surveillance below 500 feet is not subject to logical plain view analysis and, moreover, such low altitude surveillance presents an inescapable tendency to intrusiveness.

A. An altitude of 400 feet is not a public thoroughfare.

Altitudes for air traffic are established by the Federal Aviation Administration (FAA). See 14 C.F.R. § 91.79. Those regulations provide that "no person may operate an aircraft below" the following altitudes: 1000 feet over the highest obstacle within a radius of 2000 feet, when over congested areas; 500 feet above any person, vessel, vehicle or structure in noncongested areas.

The FAA, recognizing the special services that may be provided by helicopter, then allows an exception for helicopters, providing that helicopters may be operated at less than the minimum altitudes under certain conditions there set forth, including compliance with routes and altitudes prescribed by the Administrator.

This exception does not mean that altitudes under 500 feet may be considered normal public thoroughfares. Webster supplies the following definition of "thoroughfare":

> 1: a way or place through which there is passing:...
> 2: an unobstructed way open to the public
> 3: an important street or highway....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2380 (1971).

This definition squares with the analysis in Ciraolo. If evidence can by seen from a road along which the public may legally be travelling, then an officer need not "shield his eyes" when he too travels along such a roadway.

Yet the public does not travel at 400 feet. The lowest altitude which the public may use as "a way or passage through" or as "an important [aerial] street or highway" is 500 feet. Even this low an altitude is seldom used, by the public or by governments, according to the record in Letcher v. Garrett, Joint Appendix at 285, 302, 355 & 363, and is only permitted for air traffic while over noncongested areas. The public does not travel back and forth under 500 feet.

The FAA itself does not view altitudes under 500 feet as public thoroughfares. "Navigable airspace" is defined by federal law, namely: "airspace above the minimum altitudes...." 49 U.S.C. § 1301 (29). 14 C.F.R. § 91.79 then provides that helicopters "may be operated at less than the minimums...." The fact that helicopters are exempted from the minimum does not change the minimum, which stands at 1000 feet and 500 feet, depending on area. 14 C.F.R. §91.79 (b) and (c). Rather, this language is an explicit recognition that the minimum altitude remains at 500 feet.

Florida basically acknowledges that the flight involved in this case, a flight under 500 feet, was a flight below the minimum altitude established for navigable air space and that it was, therefore, not in navigable airspace. Petitioner's Brief on the Merits at 29-30. However, Florida argues for some "bright line" rule, which rule is never enunciated but which would, presumably, allow flights under 500 feet.

Yet the need for and utility of a "bright line" approach serves yet another compelling reason for why surveillance under 500 feet should not be permitted under Fourth Amendment law. If the open-ended helicopter exception determines what may be considered normal public airspace for plain view purposes, then the exception would swallow the rule, and all airspace, including six inches above the ground, becomes plain view since no altitude is wholly precluded for helicopters.

Such an analysis of the Fourth Amendment question makes meaningless verbiage out of this Court's discussion of "public navigable airspace" and the 1000 foot altitude in Ciraolo, since under such an analysis all airspace becomes public navigable airspace. It further makes meaningless this Court's efforts in Oliver v. United States, 466 U.S. 170 (1984), since all land, including one foot out a backdoor, including an enclosed patio, would become in essence an "open field" for purposes of governmental intrusion.

The error in such an analysis can be further seen by considering the equivalent situation on the ground. A person might leave a sidewalk and take a shortcut across someone's front lawn. Certainly this does not create a new "public thoroughfare". Even if the owner were to

give special permission to the person to do so, making the shortcut "legal", this does not make the path "public" and an officer taking the same shortcut for surveillance purposes would not be in plain view of the house or what goes on inside. Cf. Oliver v. United States, 466 U.S. 170 (1984) (trespass in open fields and in curtilage distinguished for purposes of Fourth Amendment protection).

So it is here. The fact that the FAA has granted an exemption to helicopters to descend below 500 feet for special purposes does not make this lower altitude a public thoroughfare. Surveillance under 500 feet is simply not in plain view.

That the 500 foot minimum is established by the FAA rather than the Constitution does not affect the constitutional analysis. The FAA has established, as it was charged to do, those altitudes which accommodate interests in air travel with air safety and physical intrusiveness. Expectations of privacy, which once ascended above a home to an infinite altitude, are now curtailed to the extent one must expect anonymous flights high overhead, and in no case closer than 500 feet.

There is no justification for encroaching even more upon the sanctity of the home by removing this remaining privacy security zone.

The FAA's regulations have established the public air highways. So established, constitutional analysis must proceed therefrom just as a constitutional question involving viewing from off a paved roadway would revolve around the road in existence, not turn on speculation that the road ought to be widened.

In light of all of the above, it is simply beyond serious dispute that, when government agents descend below 500 feet to surveil curtilages, they are departing from any plain view vantage point and are viewing what the public normally cannot see. Such surveillance, without probable cause and a search warrant, violates the Fourth Amendment. *See, e.g., NORML v. Mullen*; *People v. Sabo*, 185 Cal.App.3d 845, 230 Cal. Rptr. 170 (Cal. App. 1986), *cert. denied sub nom. California v. Sabo*, __U.S.__, 107 S.Ct. 2200 (1987).

B. *Helicopters present special dangers of intrusiveness.*

As the Supreme Court noted in *California v. Ciraolo*, 476 U.S. 207 (1986), "aerial observation of curtilage may

become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *Id.* at 216 n.3. Thus, the sheer ability to view what is otherwise hidden itself makes surveillance intrusive.

In this case, the government implicitly admits that the lower altitudes are sought to enable officials to see what otherwise they cannot. Therefore it is admitted that, whatever they look at during such low surveillance, the officials are viewing "objects ... otherwise imperceptible to police or fellow citizens." *Id.*

Not only objects but persons otherwise hidden from public examination, who perhaps are working or sunbathing without regard to their clothing, are suddenly exposed to view. At 200 feet, the altitude presently used by the Virginia State Police for marijuana surveillance, faces can be discerned and recognized. Joint Appendix at 267-68, *Letcher v. Garrett*, No. 87-3605 (4th Cir., filed July 28, 1987). Public anonymity is destroyed.

Not only are the flights intrusive because they "disclose to the senses" what is "otherwise imperceptible to police or fellow citizens", they are also physically intrusive. In the record of Letcher v. Garrett, the government conceded that the Bell UH-1H (Huey) military helicopters generally used for marijuana surveillance could cause wind disturbance on the ground at 200 feet. Joint Appendix at 231. The record in that case contained undisputed evidence that the helicopter surveillance as conducted at 200 feet blew clothes off a clothesline, broke limbs off a tree, frightened children, frightened and greatly disturbed elderly individuals, and even blew over an outhouse. E.g., Joint Appendix at 31-33, 45-46 & 108-09, Letcher v. Garrett. It was not disputed in that case that the military helicopters were noisy and disruptive from the ground, causing approximately three times more noise and wind disturbance than average civilian helicopters, and were sufficiently noisy that the victims below could not even converse at a shout. Joint Appendix at 272-73, 305 & 318, Letcher v. Garrett.

Florida, though on the one hand urging an elusive "bright-line" rule, acknowledges exceptions when helicopters are used in a harassing manner or are physically intrusive, though Florida never defines or

even describes what it would consider to be physically intrusive. The very need for such exceptions, drawn from Ciraolo, further undercuts the feasibility of Florida's fuzzy "bright line".

Moreover, contrary to Florida's implication that abuses could be easily kept to a minimum, the records in the cases of Letcher v. Garrett and NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), if not logic alone, quickly disprove this hypothesis. Violations and abuses would be virtually impossible to police in any effective manner once the 500 foot minimum were discarded. The evidence in Letcher v. Garrett, for example, indicated that, despite numerous citizen complaints, the government never determined that any pilot had ever violated a directive. Joint Appendix at 231 & 554, Letcher v. Garrett. Without a pilot's confession, it would be difficult if not impossible for an isolated, rural civilian, on the ground, to prove in any court the special harassing nature and/or physical intrusiveness of any particular flight. Such abuse can only be effectively policed when governmental surveillance is confined to the altitudes of normal public air traffic.

For all these reasons, the only feasible "bright line" is that which establishes that surveillance in normal navigable air space, that is above 500/1000 feet — and only such aerial surveillance — is in "plain view".[5]

It is no new discovery that what cannot find a home in logic must retreat to an emotional enclave. In the present case, the weight of Florida's argument relies not on sound analysis of Fourth Amendment law or Fourth Amendment history. As pointed out, Florida never even once defines its "bright line", whether, for example, this line would allow all aerial surveillance, including one foot off the ground. Rather than dwelling on such questions of logic, Florida resorts to the emotional rhetoric of the "war on drugs", making such emotionally-charged statements as:

> The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs.

---

[5] Of course, if a helicopter needed to descend for some other lawful and neutral purpose, such as for emergency medical care, and during the descent evidence of a crime were viewed, this would fall within traditional plain view analysis. It is below 500 feet that the neutrality of the flight becomes relevant.

Petitioner's Brief on the Merits at 27; see also Brief of Airborne Law Enforcement Association, Inc., as Amicus Curiae at 3 ("war against drugs").

COVER supports legitimate law enforcement efforts towards the eradication of any illegal activity. Yet even were warrantless, low-flying surveillance of the curtilages of the populace important to such efforts, which it is not [6], even rape, kidnapping, and murder have never justified warrantless searches of the homes of innocent and guilty alike. Such rhetoric as the "war on drugs", itself now used as a "drug" on the masses as has been observed by commentators, ought not to be allowed to lull this country into discarding precious, fundamental tenets upon which this country was based.

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[6] As the evidence in the record of Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987), indicates, only a minute percentage of marijuana manufacturing occurs within the curtilages. E.g. Joint Appendix at 105, 122-158, with 226 (number of occasions marijuana retrieved from curtilages in 1985 program), compared with 242-251 (overall seizures for 1985).

CONCLUSION

The only feasible as well as constitutional rule regarding aerial surveillance is one which prohibits aerial surveillance below normal public thoroughfares of 500 feet or above.

Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,
Petitioner,

vs.

MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF FLORIDA AND ACLU OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union Foundation is a nationwide, nonpartisan organization of over 250,000 members dedicated to advancing fundamental constitutional rights.

The Florida affiliate of the ACLU has a specific interest in this case which arose within its jurisdiction.

The Southern California affiliate of the ACLU, located in Los Angeles, represents the interests of members in the southern part of this State. The Southern California affiliate has a particular interest in this case because police deployment of routine helicopter patrols over the suburban houses and yards that primarily comprise the Southern California geographic area poses a specific threat to privacy.

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[1] Pursuant to Rule 36.2 of the Rules of this Court the parties' letters of consent to the filing of this brief were filed by counsel for respondent with the Clerk of this Court on April 29, 1988.

Moreover, amici are committed to the preservation of the home as a place where any person can reasonably expect to be free from government surveillance and in the protection of that freedom from infringement by ever increasing advancements in technology.

SUMMARY OF ARGUMENT

The clear language of the Fourth Amendment imbues the family home with heightened privacy protections that extend to the boundaries of its curtilage. This heightened protection requires that governmental conduct deemed acceptable in some other public locale, such as open fields, must be subjected to

much closer scrutiny when the privacy of the home is at stake.

When police, without first securing a warrant, position a helicopter over a home and residential yard so as to peer into the interior of an appurtenant structure, they contravene the privacy that all Americans reasonably expect. Surely Americans need not block out windows or retreat into basements so as to manifest subjective privacy expectations that society would recognize as objectively reasonable. Yet the "bright line rule" that the State of Florida champions would permit this most intrusive sort of helicopter surveillance, subject only to the caveat that federal aviation safety regulations not be violated. This use of a helicopter is a type of surveillance that collides with Fourth Amendment protections, not simply because the aircraft makes an unreasonable noise, kicks up dust, or in some other manner physically disturbs the peace and quietude of the home dweller, but because the manner of its use exceeds societal expectations and violates the integrity of the home.

ARGUMENT

I.

A GREENHOUSE, TEN TO TWENTY FEET BEHIND A RESIDENCE, IS WITHIN THE CURTILAGE OF THE HOME AND AS SUCH IS PRESUMPTIVELY A PLACE THAT RESIDENTS CAN REASONABLY EXPECT TO BE PRIVATE

The Fourth Amendment, as it applies to the States through the Fourteenth Amendment, prohibits unreasonable searches of persons, their houses and their papers and effects. "The Fourth

Amendment protects against governmental intrusion upon 'the sanctity of a man's home and the privacies of life.' Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)." Lewis v. United States, 385 U.S. 206, 213 (1966). Freedom from surveillance, especially in a person's living quarters, is a central tenet of the Fourth Amendment of grave concern to a society "which chooses to dwell in reasonable security." Johnson v. United States, 333 U.S. 10, 14 (1948). This Court has long acknowledged that the right to retreat into one's own home and there be free from unreasonable governmental intrusion is at the very core of Fourth Amendment protections. Silverman v. United States, 365 U.S. 505, 510 (1961). The language of the Fourth Amendment itself gives sanction to the concept, central to our legal and cultural understanding, that the home is the paragon situs of privacy.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when—bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'

Payton v. New York, 445 U.S. 573, 589 (1980); see also New York v. Burger, ___ U.S. ___, 107 S.Ct. 2636, 2642 (1987) (differentiating those privacy expectations society is prepared to recognize in a home from the lesser expectations attendant to a business enterprise). This special status afforded the home under the Fourth Amendment has been affirmed by this Court

as early as Boyd v. United States, 116 U.S. at 630 and as recently as California v. Greenwood, ___ U.S. ___, 108 S.Ct. 1625 (1988).

The heightened Fourth Amendment protection does not stop at the exterior walls of the house but extends to the boundaries of the curtilage, and includes in its scope those outbuildings situated within the area of the curtilage. California v. Ciraolo, 476 U.S. 207, 212-213 (1986); Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968) ("The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto.")

> The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.

Dow Chemical Co. v. United States, 476 U.S. 227, 235 (1986); see also United States v. Dunn, ___ U.S. ___, 107 S.Ct. 1134, 1139 (1987); Oliver v. United States, 466 U.S. 170, 180 (1984); Hester v. United States, 265 U.S. 57, 59 (1924). Indeed, "[t]he curtilage . . . has been considered part of the house itself for Fourth Amendment purposes." Oliver v. United States, 446 U.S. at 180.

Curtilage is that "space necessary and convenient, habitually used for family purposes and carrying on of domestic employment; the yard, garden, or field which is near to and used in connection with the dwelling." Wellford

v. Commonwealth of Virginia, 227 Va. 297, 315 S.E.2d 235, 238 (1984). Thus, curtilage at least includes the area that Americans would recognize instantly in suburban terms as the "yard" and at a minimum must accommodate sufficient space to allow a householder to go about his or her daily routine--hang out laundry, walk to the car, tend a flower bed, sit in the sun or engage in similar homely pursuits.

Certainly the suggestion that the curtilage of a dwelling on rural acreage should extend fewer than ten to twenty feet from the house would deprive curtilage of all meaning. For that reason, Michael Riley's greenhouse situated that distance from his trailer home was surely within its curtilage, and as such, entitled to its privacy protections. Oliver v. United States, 466 U.S. at 180; Dow Chemical Co. v. United States, 476 U.S. at 235-236.

Amici are aware that this Court recently articulated factors useful in determining whether an area or outbuilding was so intimately tied to the family home "that it should be placed under the home's 'umbrella' of Fourth Amendment protection." United States v. Dunn, 107 S.Ct. at 1139. Those factors were (1) the proximity of the area to the home; (2) whether the area was included within an enclosure surrounding the home; (3) the nature of use to which the area was put; and (4) the steps taken to protect the area from observation by people passing by. Id. Acknowledging that these factors established neither a formula for mechanical application in

every situation nor one that would always yield a correct answer, this Court found them useful tools to analyze whether the ground level approach to a barn situated some 50 yards beyond the fence surrounding a ranch house violated privacy interests that the rancher had in his home and in those appurtenant structures within its curtilage.

It is highly uncertain whether the Dunn factors were meant to apply to a structure only 10 to 20 feet from the house, and thus clearly within its curtilage by any reasonable definition. Even applying the Dunn factors, however, there is no question that Riley's greenhouse was within the curtilage of his home: it was immediately adjacent to the trailer in which Riley lived (10 to 20 feet away); included within a fence that at least partially enclosed both structures (Deputy Sheriff Kurt Gell testified that the greenhouse was within the area enclosed by the fence and the trial court included this in its findings); and Riley clearly took sufficient means to protect its interior from the observation of people passing by (the interior of the greenhouse was protected by opaque walls on two sides and obscured by shrubbery or by the trailer on the others). Thus three of the Dunn factors are present.

The remaining factor, the nature of uses to which the area is put, may be of assistance in delineating whether a structure some distance from a dwelling house is so closely associated with domestic activities that the curtilage must extend that far, but cannot be

relevant when the area in question is immediately outside the house. Since definitionally curtilage is the area that surrounds a dwelling house, it is "land," not "buildings." Thus the extent of ground included within a home's protected status might be determined by reference to use, but that factor alone provides no basis for excluding a structure, such as Riley's greenhouse, right next to a dwelling, from the protection of the curtilage area that clearly underlies it. Accordingly the suggestion, advanced both by petitioner and by amicus Airborne Law Enforcement Association, Inc., that Riley's greenhouse was used for commercial agricultural purposes and thereby precluded from enjoying the privacy protections of the home, is entirely misconceived.

Recognizing the heightened Fourth Amendment protection enjoyed within the curtilage, this Court frequently has drawn distinctions between that area and less protected open fields. Hester v. United States, 265 U.S. at 59; Oliver v. United States, 466 U.S. at 180; United States v. Dunn, 107 S.Ct. at 1139; Dow Chemical Co. v. United States, 476 U.S. at 235-36. Thus in Oliver, government trespass on private land to find marijuana growing in secluded areas distant from the home and curtilage did not offend the Fourth Amendment. This Court recognized that "the common law distinguished 'open fields' from the 'curtilage'" and that the curtilage was "considered part of home itself" and thus enjoyed coextensive privacy protections. Oliver v. United States, 466 U.S. at 180.

"Conversely, [since] the common law implie[d] . . . that no expectation of privacy legitimately attache[d] to open fields," this Court reasoned that entering such fields without a warrant did not contravene any reasonable expectation of privacy. Id.

Similarly, in United States v. Dunn, because the barn was not located within the protected area of the curtilage, "[i]t follow[ed] that no constitutional violation occurred . . . when the officers crossed over [Dunn's] ranch-style perimeter fence, and over several . . . interior fences" to gain access to the barn and the phenylacetone laboratory it contained. United States v. Dunn, 107 S.Ct. at 1141.

This Court's conclusion in Oliver, Dunn, and earlier in Hester, that government entries onto land did not contravene Fourth Amendment protections was because the areas entered were merely open fields and not within the curtilage of a home. Manifest in this Court's differentiation of open fields from curtilage is the converse rule--that any government intrusion onto private lands that lay within the curtilage of a home must implicate Fourth Amendment protections. While this is inevitable and readily apparent when actual trespass is at issue, it also is true when the challenged government intrusion is something other than physical invasion of land, since "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated . . ." United States v. Karo, 468 U.S. 705, 712-

713 (1984). Indeed, if the heightened privacy protection of the home is to retain any meaning whatsoever, a wide range of governmental conduct fully permissible outside the curtilage walls cannot be tolerated within. And this is true whether the government conduct is physically intrusive or merely violative of the reasonable expectations of privacy in the home as recognized by societal norms. Katz v. United States, 389 U.S. 347 (1967).

In Katz, this Court rejected the teachings of earlier opinions which triggered Fourth Amendment protections only upon actual trespass, holding instead "that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz v. United

States, 389 U.S. at 353. By electronically recording Katz' conversation on a public telephone, the government "violated the privacy upon which [Katz] justifiably relied." Id. Recording the conversation without a warrant constituted a search and seizure within the meaning of, and prohibited by, the Fourth Amendment, even though no physical invasion of a protected space had occurred. Id. After Katz, the relevant inquiry in determining the constitutionality of any search has been whether a person "exhibited an actual (subjective) expectation of privacy," and "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. at 361 (Harlan J., concurring); United States v. Knotts, 460 U.S. 276, 281 (1983).

Riley's expectation that the curtilage around his home--including his greenhouse--would be free from government inspection was completely reasonable. His constitutionally protected expectation of privacy might have been greatly diminished had his greenhouse been located in some distant open field; protecting the interior of so isolated a greenhouse might require extraordinary measures. But similar measures can not be necessary to maintain privacy in a greenhouse not twenty feet from a home, where the most diligent attempts of a non-airborne, curious police officer cannot achieve even a glimpse of the roof.

In short, Riley did all that society would reasonably expect by shielding his greenhouse sufficiently to preclude curious passersby from viewing its contents. Indeed, as the trial court found, Mr. Riley exhibited his expectation by deliberately using trees, shrubbery, and corrugated roofing to enhance the privacy in his greenhouse.

Unlike the citizens of some futuristic, Orwellian society, Americans need not construct "light-tight, air-proof box[es]" around themselves, their homes, or activities within the curtilage of their homes "to preserve a modicum of privacy." Lorenzena v. Superior Court, 9 Cal.3d 626, 637, 511 P.2d 33, 41, 108 Cal.Rptr. 585, 593 (1973). To the contrary, within the heightened protections of the home and its curtilage, a person need not guard against all possible surveillance from any vantage point or of any type in order

for subjective privacy expectations to meet societal standards of reasonableness, but need only erect barriers sufficient to preclude the view of reasonably curious users of the general public thoroughfares.

II.

POSITIONING A HELICOPTER DIRECTLY OVER A RESIDENCE AND BUILDINGS WITHIN ITS CURTILAGE INVADES THE HEIGHTENED PRIVACY EXPECTATIONS OF THE HOME AND OVERSTEPS WHAT SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE

As described by the State of Florida, the helicopter provided the sheriff's deputy with a "platform" in the sky, directly over Riley's yard and greenhouse. Petitioner's Brief on the Merits, pp. 23, 24, 28. As such it allowed a view not generally available to the public either from the ground or, for that matter, from a fixed wing commercial aircraft traveling through the sky. That "platform," which allowed the sheriff's deputy to see what was not visible from any public vantage point, [2] invaded the privacy of the home and curtilage.

Plainly, society does not expect that the New York City police will position a helicopter outside the bedroom window of a high rise apartment, nor that a Los Angeles Police helicopter will hover over a rooftop skylight affording a direct view of family living quarters. The sheriff's helicopter circling Riley's greenhouse immediately next to his house

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[2] As Deputy Gell testified, his efforts to see into the greenhouse from locations outside Riley's property were uniformly unsuccessful. J.A. at 20-21. Moreover, the record is devoid of evidence to support petitioner's suggestion that the interior of the greenhouse would have been visible from aerial view at 1000 feet in a fixed wing aircraft.

at 400 feet or lower [3] in order to see inside the greenhouse differs only slightly in degree and not at all in kind from these examples. Each is government activity from which citizens rightly expect to be free. Such platforms in the sky are clear examples of government conduct that oversteps Fourth Amendment privacy protections in the home by revealing that "'intimate activity associated with the "sanctity of [the home] and the privacies of life."'" U.S. v. Dunn, 107 S.Ct. 1134, 1139, quoting Oliver v. United States, 466 U.S. 170, 180, quoting Boyd v. United States, 116 U.S. at 630. No more than Pasco County sheriffs could, with complete impunity, walk onto Riley's land and look directly into his greenhouse, could they subject his home or a structure within its protected curtilage to surveillance, electronic or otherwise, that so blatantly contravenes societal expectations.

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[3] At the hearing on the suppression motion Deputy Gell testified that when he first flew over Riley's greenhouse the helicopter was at approximately four hundred feet. J.A. at 26. Then in response to defense counsel's question whether the helicopter ever got lower than four hundred feet, Gell first answered, "I don't know I wasn't paying attention to the height. I was keeping an eye on the trailer and the greenhouse." J.A. at 27. Gell later testified that he was unsure if the helicopter dropped below its initial altitude, adding, "If we dropped a hundred feet, I have no idea." J.A. at 30. He then said, "Well, when we came in, we were a lot higher than when we circled." J.A. at 31.

Gell's complete testimony on the helicopter's altitude reads that the aircraft flew in at 400 feet, which was a higher altitude then when it actually circled over the greenhouse.

Petitioners make much of plentiful air traffic and argue that society reasonably can expect aircraft to fly

over private land. Petitioner's Brief on the Merits, p. 25. Certainly air flight is a common fact of modern life, and commercial airplanes flying far above the ground are not an unfamiliar sight. However, helicopters are not only far less pervasive but far more intrusive. The day has yet to come when society has become accustomed to carrying out personal lives under the watchful eyes of police helicopters, either hovering noisily above, or swooping down to peer into interior space; and this Court should not hasten that day.

The home and its curtilage are accorded a sort of protective bubble of privacy. Americans need not retreat into basements in order to take advantage of that privacy the framers crafted into the Amendment. Certainly residents cannot conduct their intimate domestic activity in brazen disregard of police or other citizen's use of public thoroughfares; marijuana growing in a living room window readily apparent to any passerby on the public street or to a mail carrier at the front door is not insulated from government view. Society clearly does not recognize such inattention, even within the dwelling house, as a reasonable assertion of privacy. However, the contents of a greenhouse not visible from public vantage point do not lose the protections of the home-curtilage bubble merely because the police employ extraordinary means to circumvent privacy expectations reasonably asserted. It is in this regard that the facts of Ciraolo differ markedly from those in the instant matter.

In Ciraolo, this Court declined to hold that a police officer's state of mind when he focused upon suspected marijuana cultivation in a suburban backyard was sufficient to invoke Fourth Amendment protections or to require the suppression of the marijuana plants grown openly in the yard, visible to the passing glance of any member of the commercial flying public. Thus, when the officer, acting upon an anonymous telephone tip, secured a private plane and flew at an altitude of 1000 feet over the house and yard, his observation of 75 marijuana plants, eight to ten feet tall, was held not to be a search necessitating a warrant.

What is clear from Ciraolo is that, even within the privacy of the home and its curtilage, to establish a reasonable expectation of privacy an individual must take some precautions to protect from view items visible from a commercial fixed wing aircraft. Since commercial planes can be expected to fly at altitudes as low as 1000 feet, this Court reasoned that no search occurred when a police officer, like any other member of the flying public, observed from that vantage point the plants growing openly in a backyard. Since it was not objectively reasonable that such large plants grown openly in a yard and visible from public air space to commercial travelers glancing from fixed wing aircraft would not be seen, this Court described as no more than a "hope" any subjective expectation Ciraolo might have had that the plants would remain hidden from overhead public view.

In this case, unlike Ciraolo, plants were not grown openly; rather they were contained within a greenhouse, which sheltered them completely from passersby on any public thoroughfare. There is no evidence on this record that the plants would have been either visible or identifiable from a fixed wing aircraft at 1000 feet, such as this Court found to constitute no search. [4]

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[4] Plainly, as the proponents of the evidence eventually seized, petitioners had the burden to establish an exception to the warrant requirement, a burden they cannot meet by reference to Ciraolo without presenting evidence that the plants could have been seen and identified from a fixed wing aircraft at 1000 feet. Their belated assertions before this Court cannot create a record they failed to make at the trial court suppression motion hearing.

Unlike the fixed wing plane in Ciraolo, the helicopter used to obtain a view into Riley's greenhouse had the unique ability to duck, bob, hover and pirouette in the sky, abilities that have been judicially noticed. People v. Sabo, 185 Cal.App.3d 845, 853, 230 Cal.Rptr. 170, 175 (1986), cert. denied, 107 S.Ct. 2200 (1987). It was also at least 600 feet closer to the ground and to the object of its surveillance than was the airplane used in Ciraolo. Moreover, the F.A.A. regulations grant helicopters virtually limitless sanction to fly at any height, subject only to the caveat that public safety not thereby be endangered. Merely because these regulations would allow a helicopter to fly five feet off the ground, individuals cannot be expected to barricade their

houses against the snooping eye of governmental officials operating helicopters at that height in order to preserve their constitutional right of privacy. 5/

Amicus Airborne Law Enforcement Association, Inc. provides insight into the far ranging use of helicopters by government agents; indeed various police agencies may well be the primary users of

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5/ Someone who resides on property, which due to its location is subject to frequent helicopter overflights in the normal course of events may need to take extra precautions, even within the curtilage of the home, to protect against observations made from helicopters. See, e.g. United States v. Allen, 675 F.2d 1373, (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981). However, the precautions that might be expected of a person who lives next to a Los Angeles freeway would most certainly exceed those of Mr. Riley and other rural dwellers who have no reason to suspect that news gathering or traffic control helicopters will frequent the airspace over their homes.

helicopters. However, the single determinant of societal expectations certainly cannot be the exact governmental conduct the Fourth Amendment is intended to curtail. The police cannot systematically reduce privacy expectations by increasing helicopter flights and conducting them at lower and lower altitudes.

It is in this regard that petitioner's suggestion that this Court adopt a bright line rule that "warrantless naked-eye aerial observation is valid . . . so long as the aircraft is operated where it lawfully may be" (Petitioner's Brief on the Merits, p. 13) ignores the necessary Fourth Amendment inquiries. F.A.A. decisions that helicopters may be safely operated at virtually any altitude provide no basis

for concluding that societal expectations of privacy mirror those safety concerns. To the contrary, although it is highly likely that the bugging device utilized in Katz itself met some government safety specifications, that was completely irrelevant to this Court's Fourth Amendment analysis.

Moreover, the bright line rule petitioner suggests disregards the difference between open fields and curtilage, and would sanction operation of helicopters, without Fourth Amendment implication, identically in locations of heightened and of little inherent privacy. In fact, the concerns reflected in the F.A.A. regulations largely contradict those pertinent to Fourth Amendment; air safety requires planes to fly above 500 feet and yet fixed wing craft are far less intrusive to privacy than helicopters, which because of their maneuverability pose a much greater threat to privacy but are allowed to fly at lower altitudes under the F.A.A. regulations. Thus, at most, compliance with F.A.A. safety standards provides one possible factor to consider in weighing whether government conduct exceeds societal bounds, but is not a proper basis to conclude that any particular police surveillance flight comports with Fourth Amendment requirements.

Mr. Riley built his greenhouse next to his rural, trailer home, taking care to protect its contents from the view of anyone on the road that ran by his five acre property; his removal, or failure to install, some roofing panels did not expose its interior to public view.

Deputy Gell testified that he could not even see the roof from any location on the roadway. J.A. at 22. Petitioner further agrees that Riley, and his rural Pasco County neighbors, had no reason to anticipate that helicopters would be flown at low altitudes over the area. Petitioner's Brief on the Merits, p. 32. In short the greenhouse contents were obscured from all vantage points--except one arranged by flying a helicopter to the airspace over Riley's home and greenhouse, maneuvering the craft over the opening, and then circling at low altitudes in order to see inside. To sanction this warrantless surveillance of the interior contents of a building located squarely within the protective curtilage of a home would expose all Americans, their homes and effects, to highly intrusive snooping by government agents, limited only by the agent's ability to safely maneuver a helicopter or some future, even more mobile, aircraft.

CONCLUSION

Since Katz teaches that Fourth Amendment analysis does not lend itself to talismatic--or formulaic--solutions, no bureaucratic determination of the safe operation of a particular aircraft can override constitutional guarantees of privacy in the home. Instead, subjective assertions of privacy must be balanced against the more objective societal expectations of what is reasonable under the circumstances. Riley's greenhouse and the privacy Riley expected it to retain qualify under both Katz prongs.

Not only was the greenhouse, situated right next to Riley's dwelling thereby imbued with the inhanced privacy incident to his home and its curtilage, but Riley undertook specific precautions to shield its contents from public view; his efforts were successful and in full comport with objective standards of reasonableness. Consistant with this Court's interpretation of the Amendment and the protection it affords, he need not have done more.

For the reasons explained above, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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